TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 311 // 3

DAVID HOSTETTER, SURVIVING PARTNER OF THE FIRM OF HOSTETTER AND SMITH, APPELLANT,

vs.

R. C. GRAY AND ALEXANDER H. MILLER, W. A. CALDWELL, JAMES P. DONNELL AND J. G. HOLMES, EXECUTORS OF M. W. BELTZHOOVER, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 7, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 344.

DAVID HOSTETTER, SURVIVING PARTNER OF THE FIRM OF HOSTETTER AND SMITH, APPELLANT,

vs.

R. C. GRAY AND ALEXANDER H. MILLER, W. A. CALDWELL, JAMES P. DONNELL AND J. G. HOLMES, EXECUTORS OF M. W. BELTZHOOVER, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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1 Among the rolls, records, and judicial proceedings had in the circuit court of the United States for the western district of Pennsylvania, wherein Hostetter & Smith are libellants and appellants and R. C. Gray *et al.* are appellees, may be found the following words and figures, to wit:

Docket Entries.

November Term, 1882.

DAVID HOSTETTER and GEORGE W. SMITH, Partners as Hostetter & Smith, Appellants, *vs.* R. C. GRAY and ALEXANDER H. MILLER, W. A. CALDWELL, James P. Donnell, and J. G. Holmes, Ex'rs of M. W. Beltzhoover, Deceased, Late Owners of the Steam Tug "Iron Mountain" and Barge "Ironsides No. 3."	No. 3.

A. H. Clarke, S. A. Will, Knox & Reed.

Appeal of Hostetter & Smith, libellants, from the decree of the U. S. district court, sitting in admiralty.

Transcript of record from the U. S. district court for the western district of Pennsylvania filed May 12, 1882.

1882, November 6.—Appellants' statement of facts and conclusions of law filed with service of copy thereof accepted by Knox & Reed, att'ys for respondents.

1883, May 15.—Argument had upon above appeal by
2 counsel for the respective parties, *c. a. v.*

1883, May 18.—Finding of facts, with the court's conclusions of the law thereon, filed.

Same day.—Decree filed dismissing the libel of libellants at costs of appellants.

1883, June 29.—Exceptions by appellants to taxation of costs herein filed.

1885, March 10.—Exceptions to the taxation of costs herein sustained.

1885, May 8.—In open court A. H. Clarke, Esq., proctor for libellants, suggests death of George W. Smith, which occurred October 30th, 1884, and the substitution of David Hostetter, surviving partner of the above-named firm, as libellant.

Same day.—Petition for appeal to U. S. Supreme Court presented and appeal allowed.

1885, May 12.—Bond on appeal to U. S. Supreme Court in the sum of one thousand dollars, with Chas. S. Frisbee and R. S. Robb as sureties, approved by the court, this day filed.

1885, September 29.—Libellants' assignment of error filed.

3 *Docket Entries.*

United States District Court.

DAVID HOSTETTER and GEORGE W. SMITH, Partners as Hostetter & Smith,

vs.

R. C. GRAY and ALEX. H. MILLER, W. A. CALDWELL, JAMES P. DONNELL, and J. G. Holmes, Ex'rs of M. W. Beltzhoover, Dec'd, Late Owners of the Steam Tug "Iron Mountain" and Barge "Ironsides No. 3."

A. H. Clarke, S. A. Will, Knox & Reed.

March 4, 1880.—Libel *in personam* and stipulation for costs filed.

March 5, 1880.—On motion process *in personam* issued, returnable 16th inst.

March 9, 1880.—Writ returned:

"Served the within writ upon the within-named Alex. H. Miller personally and by copy, he being one of said executors. Served the within writ upon the within-named R. C. Gray and W. A. Caldwell, James P. Donnell, and J. G. Holmes, ex'rs of M. W. Beltzhoover, deceased, personally by showing the original to each of them and at the same time giving to each of them a true copy."

March 13, 1880.—Order extending time for filing answer to Saturday, 20th instant, filed.

March 19, 1880.—Answer of R. C. Gray and A. H. Miller *et al.*, ex'rs of M. W. Beltzhoover, dec'd, filed.

March 31, 1880.—Motion for leave to amend libel as per paper presented and by order of court; same filed and set down for hearing.

April 7, 1880.—On motion *for* proctors for libellants and by leave of court supplemental and amendatory libel filed, and respondents have fourteen days to answer same.

4 April 28, 1880.—Answer to supplemental libel filed.

May 1, 1880.—Samuel Harper, Esq., appointed commissioner to take the testimony in this case.

June 24, 1881.—Testimony taken before A. S. Ludlow, special commissioner, by agreement filed.

December 8, 1881.—Precipe to put case on argument list filed.

Dec. 15, 1881.—The 23rd instant fixed for argument.

Dec. 23, 1881.—Deposition of H. C. Buehoup on behalf of libellants filed.

Same day.—Testimony and exhibits filed.

Same day.—Argument on said libel, answer, and proofs and further argument continued to the 24 instant.

Dec. 24, 1881.—Argument concluded, *c. a. v.*

Feb. 18, 1882.—Opinion of the court and order that a decree be drawn dismissing the libel with costs filed.

February 20, 1882.—The following is a copy of the decree:

"And now, February 20th, 1882, the above cause having come on to be heard upon the libel, answer, and proofs, and due consideration being had in the premises, it is, on motion of Knox & Reed, proctors for respondents, ordered, adjudged, and decreed that the libel be, and the same is hereby, dismissed with costs to the respondents, to be taxed by the clerk."

Feb. 21, 1882.—Respondents' bill of costs filed.

Feb'y 28, 1882.—Leave granted libellants to appeal from said decree to the U. S. circuit court.

Same day.—Notice of appeal to C. C. and stipulation for costs on appeal filed.

Mar. 1, 1882.—Received of the said plaintiff the sum of six
5 hundred sixty-one dollars and five cents, amount of costs.

March 2, 1882.—An order was made directing the clerk to distribute the costs taxed and paid as aforesaid in this case.

March 9, 1882.—Appeal filed with indorsement of acceptance of service by proctors for appellees.

6 In the United States District Court in and for the Western District of Pennsylvania, Sitting in Admiralty.

DAVID HOSTETTER and GEO. W. SMITH, Partners as Hostetter & Smith,

versus

R. C. GRAY and ALEX. H. MILLER, W. A. CALDWELL, JAMES P. DONNELL, and J. G. Holmes, Executors of M. W. Beltzhoover, Deceased.

Libel *in personam.*

To the Honorable Marcus W. Acheson, judge of the above-named court:

The libel of David Hostetter and Geo. W. Smith, partners and doing business under the firm name and style of Hostetter & Smith now and for twenty-five years or more last past at the city of Pittsburgh, in said district, against R. C. Gray and Alexander H. Miller, W. A. Caldwell, James P. Donnell, and J. G. Holmes, executors of M. W. Beltzhoover, deceased, late the owners of the steam tug "Iron Mountain" and barge "Ironsides No. 3," *are* of said parties libellants and respondents, residents of said city and district in a cause of contract, civil and maritime, alleges as follows, to wit:

First. That on the 5th day of December, A. D. 1874, and
7 from that date until some time during the year 1879—the precise date libellants are unable to state—the said R. C. Gray and the said M. W. Beltzhoover, now deceased, were the owners of the said steam tug "Iron Mountain" and barge "Ironsides No. 3," as libellants are informed and believe, and that said steam tug and barge were engaged in navigating the Ohio and Mississippi rivers

and their tributaries as common carriers, and that they were so advertised and published and known to the public and shippers generally.

Second. That said steam tug "Iron Mountain" and barge "Ironsides No. 3," together with other barges, were at the public landing or wharf at the port of Pittsburgh, in said district, on the 5th day of December, 1874, and were by respondents herein advertised for and about to proceed upon a voyage to the port of New Orleans, La., direct, and that on said day—or at about that time—respondents, by their agent, came to libellants at their place of business, applied for and procured cargo for said steam tug and barges upon the representation that said tug and barges would proceed without delay and with dispatch to the port of destination, viz., New Orleans, La., and that an agreement was made by and between libellants and respondents that libellants were to ship upon said tug and barges 2,000 boxes of bitters and 18 boxes of show-cards, which re-

8 spondents were to receive and transport to the said port of New Orleans, La., as common carriers, and libellants did so ship the said 2,000 boxes of bitters and 18 boxes of show-cards, all in good order and condition, and the same were received by respondents and placed on board said barge "Ironsides No. 3," as libellants are informed and believe, and respondents agreed to deliver the said bitters and show-cards without delay and in like good order and condition, at the said port of New Orleans, La. (the dangers of navigation, fire, and unavoidable accidents excepted), unto Jno. T. Moore & Co., the agents of libellants, they to pay freight at the rate of 20 cents per box thereon, and that in confirmation of said agreement three (3) bills of lading were signed by W. P. McConnell, the clerk of said tug and barges; one of said bills of lading is attached to this libel, marked Exhibit "A," made a part hereof, and profert made to this honorable court; that the cash value of said 2,000 boxes of said bitters at the date of shipment was $8.00 per box, making $16,000.00, and of said 18 boxes of show-cards $2.80 per box, making $50.40.

Third. That upon the day following the receipt of said bitters and show-cards on board said barge "Ironsides No. 3" and the execution of the said bills of lading, to wit, December 6th, 1874, the said

9 steam tug "Iron Mountain" steamed from said port of Pittsburgh, having in tow said barge "Ironsides No. 3" and sundry other barges belonging to said tug, and proceeded down the Ohio river and toward the port of destination and arrived safely at the town of Mt. Vernon, Indiana, on the 17th day of December, 1874, as libellants are informed and believe, and there took on board said barge "Ironsides No. 3" additional cargo, consisting of flour in barrels, and that the said tug, instead of proceeding on down the Ohio river and toward the port of destination without delay and in accordance with the terms of said agreement and said bill of lading, dropped or left all of said barges except the "Ironsides No. 3," and wrongfully, negligently, and unlawfully, and without notice to libellants, deviated from and abandoned the voyage undertaken to New Orleans, La., by steaming up the said Ohio

river several miles to the town of New York Landing, in Henderson county, Kentucky, and then took on board said barge "Ironsides No. 3" still additional cargo, consisting of a quantity of corn, as libellants are informed and believe, and that later in the evening of the following day, to wit, December 18, 1874, the voyage down the river was again undertaken by passing or attempting to pass for the third time over the distance between New York Landing and Mt. Vernon, but that shortly after leaving said landing or in rounding out therefrom or at a point about a half a mile or a mile below, the exact place libellants being unable to designate, and before again reaching said town of Mt. Vernon, Indiana, and at about six o'clock in the evening of said 18th day of December, 1874, said barge being heavily loaded and in tow of said tug "Iron Mountain," and having on board said 2,000 boxes of bitters and 18 boxes of show-cards, struck some unseen obstruction, as libellants are informed and believe, and sunk in deep water, thereby causing great loss and damage to libellants by the destruction and damage of a large portion of said bitters and show-cards, said damage and loss amounting to $10,182.76 principal, and interest calculated to December 1st, 1879, as will more fully appear by reference to libellants' statement of account attached hereto, made a part hereof, and marked Exhibit "B."

Fourth. That it did not come to the knowledge of libellants that said steam tug had dropped all the barges except the "Ironsides No. 3" at Mt. Vernon and had deviated from the direct course to New Orleans, La., the port of destination, until the past year or two years, and that they were not informed of all the particulars of said sinking until within a few months, and when advised of their rights and of the threefold risk of loss by sinking to which they were subjected by such deviation and temporary abandonment of the voyage undertaken they have used due diligence in bringing this action; and libellants charge that such deviation and temporary abandonment of the voyage is contrary to the letter and spirit of the contract entered into by said bill of lading, and that it is against the law governing common carriers.

Fifth. Libellants state further that Capt. J. H. Dunlap, who had command of said tug and barge at the time of said sinking, telegraphed to libellants for instructions as to the disposal to be made of such of libellants' goods as were reclaimed in a damaged condition, and libellants answered to have them sent to Pittsburgh, and they were so sent by sundry persons acting as wreckers under and by order of said Captain J. H. Dunlap, and that libellants aided all in their power in assisting in said reclamation, and placed all the bitters received by them in merchantable condition, and gave respondents full credit for all so returned and at their cash value, as will more fully appear by reference to said statement of account marked Exhibit "B."

Sixth. That no portion of the claim for $10,182.76 to December 1st, 1879, has been paid, and that the whole amount still remains justly and legally due, owing, and unpaid.

12 Seventh. That the said steam tug "Iron Mountain" is a vessel duly licensed and enrolled under the laws of the United States in the office of the collector of customs for the said port of Pittsburgh, and that she was at the time of said shipment aforesaid and at the time of said sinking of said barge engaged in navigation as a common carrier upon the Ohio and Mississippi rivers and their tributaries, and in commerce between the States bordering on said rivers, and that she is a steam tug, has two decks, with stern wheel, and is about five (5) hundred tons burden; that libellants are informed and believe that said steam tug has been sold at some time during the past year to parties in St. Louis, and that she is now engaged in navigating the Upper Mississippi river and is not within the jurisdiction of this court or not within this district, and that they do not know what has become of said barge.

Eighth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellants pray that process in due form of law, according to the course of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said R. C. Gray and A. H. Miller, W. A. Caldwell, James P. Donnell, and J. G. Holmes, executors of M. W. Beltzhoover, deceased, respondents herein

13 and owners of said steam tug Iron Mountain and barges, or former owners, and that they be required to answer on oath all and singular the matters aforesaid, and that this honorable court would be pleased to decree the payment of the amount due as aforesaid with interest and costs, and the libellants may have such other and further relief as in law and justice they are entitled to receive.

HOSTETTER & SMITH,
By D. HOSTETTER.

A. H. CLARKE,
S. A. WILL, *Proctors.*

UNITED STATES OF AMERICA, *Western District of Pennsylvania:*

Personally appeared David Hostetter, who, being duly affirmed according to law, says that he is one of the libellants herein; that he has heard read the foregoing libel and knows the contents thereof, and that the same is all true of his own knowledge, except to the matters therein stated to be on information or belief, and as to such matters he believes them to be true.

D. HOSTETTER.

Affirmed to and subscribed before me this 4th day of March, A. D. 1880.

S. C. McCANDLESS,
Clerk U. S. District Court.

EXHIBIT "A."

D. Hostetter. G. W. Smith.

Hostetter & Smith, proprietors and sole manufacturers of
14 Hostetter's celebrated stomach bitters, Nos. 58, 59, and 60 Water street and First avenue, Pittsburgh, Pa.

Shipped in good order and condition by Hostetter & Smith, for account and risk of whom it may concern, on board the good steamboat called the Iron Mountain barges, whereof —— —— is master for the present voyage, now lying at the port of Pittsburgh, the following articles, marked or numbered as below, which are to be delivered without delay, in like good order, at the port of New Orleans, La. (the dangers of navigation, fire, and unavoidable accidents excepted), unto John T. Moore & Co., or assigns, he or they paying freight at the rate of (20c.) twenty cents per box.

In witness whereof the owner, master, or clerk of said boat hath affirmed to three bills of lading of this tenor and date, one of which being accomplished the others to stand void.

Dated at Pittsburgh this 5th day of December, 1874.

Marks.	Articles.	Weight.
Dr. S. Hostetter's Stomach bitters.	Two thousand (2,000) boxes bitters. Eighteen (18) boxes show-cards.	

EXHIBIT "B."

Statement of Account.

Steamer Iron Mountain, barges, and owners to Hostetter & Smith, Dr.

15 1874, Dec. 5th.—673 boxes bitters, lost by the sinking of the Iron Mountain, barge "Ironsides No. 3," near Mt. Vernon, Indiana, in December, 1874, same being a portion of 2,000 boxes bitters shipped in said barge December 5, 1874, as per bill of lading hereto attached, at 8.00 per box	$5,284 00
1875, January 11.—Freight on drayage—	
778 boxes returned to us from Cairo by Holliday Bros.	165 04
778 boxes returned to us from Cairo by Holliday Bros.	17 00
March 12.—Freight on drayage—	
200 boxes returned to us from Mt. Vernon by Thomas & Son	40 60
200 boxes returned to us from Mt. Vernon by Thomas & Son	4 00
100 boxes bitters retained by Thomas & Son at 33⅓ per cent. salvage on 300 boxes saved by them (Thomas & Son), at $8.00	800 00

April 14.—Freight and Drayage on—			
40 boxes returned by Neare & Reno, of Cincinnati, O.			7 99
42 boxes retained by Neare & Reno, of Cincinnati, O., for salvage, &c., at $8.00 per box			336 00
1885, April 14.—Cost of repacking damaged goods in our warehouse and placing same in merchantable order			82 50
1875, Dec. 18th.—167 boxes bitters sold by Geo. W. Neare, 2,000 adjusted		$1,336 00	
Less amount remitted to us by George W. Neare on same		346 39	
			989 61
16	13 boxes show-cards lost, cards each	2 20	
	Boxes, each	60	
		2 80	36 40
Interest at 6 per cent. from January 1, 1875, to December 1, 1879, four years and eleven months			2,319 62
Total			$10,182 76

Indorsed: No. 9. May term, 1880. In admiralty. U. S. dist. court, W. D. Pa. Hostetter & Smith *vs.* R. C. Gray *et al.* Libel. Filed March 5, 1880.

17 *Libellants' Stipulation for Costs. Entered into Pursuant to the Rules and Practice of this Court.*

United States District Court, Western District of Pennsylvania. May Term, 1880.

D. Hostetter and Geo. W. Smith
versus
R. C. Gray and A. H. Miller *et al.* } No. 9.

Whereas a libel was filed in this court on the 4th day of March, in the year of our Lord one thousand eight hundred and eighty by Hostetter & Smith, by D. Hostetter, against R. C. Gray *et al.*, for the reason and causes in said libel mentioned, and praying that the usual monition of said court in that behalf may issue, and the said libellant and Charles S. Frisbee, surety, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their surety execution may issue against their goods, chattels, and lands for the sum of one hundred dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of one hundred dollars, conditioned that the libellants above-named shall appear and answer to the cause and to interrogatories, and shall pay all such costs and

expenses as shall be awarded against them by this court, or,
18 in case of appeal, by the appellate court.

HOSTETTER & SMITH.
CHAS. S. FRISBEE.

Taken and acknowledged this 4th day of March, A. D. 1880, before me—

S. C. McCANDLESS, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Charles S. Frisbee, of Allegheny City, Pennsylvania, party to the above stipulation, being duly sworn, doth depose and say that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

CHAS. S. FRISBEE.

Subscribed & sworn to this 4th day of March, A. D. 1880, before me—

S. C. McCANDLESS, *Clerk.*

Order of Court.

And now, to wit, March 5th, 1880, on motion of A. H. Clarke, proctor for libellants, process *in personam* is ordered to be issued by the clerk in accordance with the practice in cases of admiralty.

By the court.

Indorsement: No. 9. May term, 1880. United States district court, western district of Pennsylvania. In admiralty. D. Hostetter & George W. Smith, partners as Hostetter & Smith, *vs.* R. C. Gray & A. H. Miller *et al.*, ex'rs of the estate of M. W. Beltzhoover, dec'd. Libel *in personam* and libellants' stipulation for costs. Filed this 4th day of March, A. D. 1880. S. C. McCandless, clerk.

19 The President of the United States to the marshal of the western district of Pennsylvania, Greeting:

Whereas a libel suit was filed in the district court of the United States for the western district of Pennsylvania on the 4th day of March, 1880, by David Hostetter and George W. Smith, partners as Hostetter & Smith, against R. C. Gray and Alex. H. Miller, W. A. Caldwell, James P. Donnell, and J. G. Holmes, executors of M. W. Beltzhoover, deceased, late owners of the steam tug "Iron Mountain" and barge "Ironsides No. 3," in a cause of contract, civil and maritime, claiming from the said R. C. Gray and Alex. H. Miller, W. A. Caldwell, James P. Donnell, and J. G. Holmes, executors of M. W. Beltzhoover, deceased, late owners of steam tug "Iron Mountain" and barge "Ironsides No. 3," the sum of $10,182.76, principal and interest, and praying that they may be cited to appear and answer under oath all and singular the matters in said libel mentioned:

Now, therefore, you are hereby commanded to cite and admonish the said defendants, if they shall be found within your district, that they

be and appear before the district court in and for said district on the 16th day of March, 1880, at 10 o'clock in the forenoon, at the United States court-room in the city of Pittsburgh, then and
20 there to answer the said libel and make their allegations in that behalf; and have you then and there this writ with your return thereto.

Witness the Honorable Marcus W. Acheson, judge of said court, at Pittsburgh, this fifth day of March, A. D. 1880.

S. C. McCANDLESS, *Clerk*.

And now, March 6, 1880, served the within writ upon the within-named Alex. H. Miller personally by showing him the original and at the same time handing *handing* him a true copy thereof, he being one of said executors.

JOHN HALL, *U. S. Marshal*,
Per WM. T. LINDSEY, *Deputy*.

And now, March 9, 1880, served the within writ upon the within-named R. C. Gray and W. A. Caldwell, James P. Donnell, and J. G. Holmes, executors of M. W. Beltzhoover, deceased, personally by showing the original to each of them and at the same time by giving to each of them a true copy thereof.

JOHN HALL, *U. S. Marshal*,
Per R. K. CAMPBELL, *Deputy*.

Indorsed: No. 9. May Term, 1880. In admiralty. U. S. district court, western district of Penna. David Hostetter & Geo. W. Smith, partners as Hostetter & Smith, *vs.* R. C. Gray and A. H. Miller *et al.*, executors of the estate of M. W. Beltzhoover, deceased. Writ *in personam*. Marshal, $12.50. Returned and filed this 9th day of March, 1880. S. C. McCandless, clerk. A. H. Clarke.

21 United States District Court, Western District of Pennsylvania.
May Term, 1880. Admiralty.

HOSTETTER & SMITH
vs.
R. C. GRAY and A. H. MILLER, W. A. CALDWELL, J. G. DONNELL, & J. G. HOLMES, Ex'rs of M. W. Beltzhoover. } No. 9.

And now, March 13, 1880, on motion of Knox & Reed, proctors for respondents, the time for filing an answer in the above case extended until Saturday, 20 March, 1880.

By the court.

Indorsement: No. 9. May term, 1880. Admiralty. Hostetter & Smith *vs.* R. C. Gray *et al.* Order extending time to answer. Filed March 13, 1880. Knox & Reed.

22 United States District Court, Western District of Pennsylvania.
May Term, 1880. In Admiralty.

DAVID HOSTETTER and GEORGE W. SMITH, Partners as Hostetter & Smith,
vs.
R. C. GRAY and ALEX. H. MILLER, WM. A. CALDWELL, J. J. Donnell, and John G. Holmes, Executors of M. W. Beltzhoover, Deceased. } No. 9.

To Honorable M. W. Acheson, judge of said court:

The answer of R. C. Gray and A. H. Miller, W. A. Caldwell, J. P. Donnell, and J. G. Holmes, executors of M. W. Beltzhoover, deceased, by and through R. C. Gray, one of said respondents, to the libel of Hostetter & Smith alleges as follows:

First. That these respondents admit the allegations in paragraph marked "first" in said libel, so far as said allegations touch upon the ownership and places of navigation of their steam vessel "Iron Mountain" and barge "Ironsides No. 3," but have no knowledge of the averment that said vessel and barge were advertised, published, and known as common carriers, as in said paragraph alleged.

Second. As to the allegations in the second paragraph of said libel respondents say they are not true in manner and form alleged,
23 but admit that said vessel "Iron Mountain," having in tow barges laden and partially laden with miscellaneous cargo consigned to New Orleans, in the State of Louisiana, and various intermediate points and places, did leave the port of Pittsburgh, in the State of Pennsylvania, on the — day of December, 1874, and that one of said barges, to wit, the "Ironsides No. 3," then and there partially laden and — on board, *inter alia*, the goods of the libellants as described in the bill of lading attached to said libel and marked as Exhibit "A," which respondents in and by said bill of lading undertook to transport to New Orleans, in the State of Louisiana, dangers of navigation, fire, and unavoidable accidents excepted; but respondents deny that they made any contract or agreements with libellants to carry said goods, either as to directness or dispatch, in manner other than in said bill of lading described and in accordance with the usage and customs regulating and governing carriers engaged in the same and similar trade upon the Ohio and Mississippi rivers and their tributaries; and respondents aver that said goods were shipped by libellants with the understanding and knowledge that said goods were not to have the exclusive ton-age or capacity of said barge "Ironsides No. 3," but that respondents had the right and privilege to complete her cargo at any point or place
24 between Pittsburgh and New Orleans where they might be able to secure the same and to receive and discharge cargo upon and from said barge in accordance with the usage and custom of trade and navigation upon the Western rivers, and particularly upon the Ohio and Mississippi rivers and their tributaries; and as to the allegation in said second paragraph concerning the value of

said bitters and show-cards respondents say they have no knowledge, and leave libellants to such proof thereof as they may be able to make.

Third. Respondents admit the allegations in the third paragraph of said libel, so far as they narrate the departure of said steam vessel "Iron Mountain" and barges from Pittsburgh, in the State of Pennsylvania, and their safe arrival and mooring at the port of Mt. Vernon, in the State of Indiana, and the reception at that port of additional cargo, but deny that said vessel and barges then and there abandoned their voyage and refused to proceed thereon without delay, as provided in their agreement with libellants and as alleged in their libel, but, upon the contrary, allege that they did proceed with all possible dispatch to take on said additional cargo at Mt. Vernon and at New York Landing, a point or place on the Ohio river in the immediate vicinity of Mt. Vernon, to which said steam vessel "Iron Mountain" towed said barge "Ironsides No. 3"
25 from Mt. Vernon, as is the usage and custom of navigation upon said river, and were only prevented from proceeding with libellants' goods toward the port of New Orleans by reason of one of the dangers of navigation, occasioning the loss of said goods and respondents' barge "Ironsides No. 3" and its contents in the manner following:

That it was at the time in said libel stated, to wit, in December, 1874, and now is and always has been since the transportation of goods by means of barges towed by steam vessels first began upon the Ohio and Mississippi rivers and their tributaries, the uniform, continued, general, and well and publicly known usage and custom of such vessels and barges to load partially at the port of departure, if such be necessary either by reason of the stage of water or lack of cargo, and to take an additional cargo at any port, place, or landing where the same might be had between the ports of departure and destination.

That upon the voyage complained of the said barge "Ironsides No. 3" departed the port of Pittsburgh partially laden and arrived at Mt. Vernon, in the State of Indiana, without having secured a full cargo.

That in securing additional cargoes along the rivers navigated en route to the port of destination it is and was at the time in said libel mentioned, and had been since barge navigation of the Ohio and Mississippi rivers began, the constant, general, well-known, and uniform custom and usage for the owners or agents of said
26 vessels and barges to land their fleets at the larger, safer, and more convenient ports, places, and landings along said rivers, and there meet and contract with shippers for the transportation of their goods, wares, products, and merchandise, and there detach from said fleet the barge or barges designated to receive said cargo (if the same be not at the point or place where said fleet is moored), and send said barge or barges so designated to receive said cargo to the point or place where the same might be stored, be the same up, down, or across the river, within such reasonable distance as might be reached without great or unreasonable delay or expense; that

the port of Mt. Vernon, in the State of Indiana, is a point where shippers within a radius of fifteen or twenty miles therefrom meet carriers upon the Ohio river, and is the port or place where shippers, whose goods are received at New York Landing, meet and contract with carriers for their transportation to points below.

That in pursuance of this general, uniform, constant, and well-known usage and custom respondents' fleet of barges did land on the — day of December, 1874, at the port of Mt. Vernon, and did there contract with certain shippers whose goods were stored and lying at New York Landing, a point between two and three miles above Mt. Vernon, to carry the same to a point or place below, to New Orleans, La., and did then and there detach from said
27 fleet the barge "Ironsides No. 3," and by means of said steam vessel "Iron Mountain" tow the same to New York Landing and take on board said barge certain additional cargo of grain, the same being done with all possible dispatch and without unreasonable delay; that in rounding out to leave said New York Landing the said barge did, without fault, negligence, or want of skill upon the part of those navigating her or the said steam vessell towing her, run upon and strike, in deep and navigable water, an obstruction unknown, unseen, unmarked, and in no way indicated, and which could not have been seen, known, or avoided by the exercise of any degree of skill, care, or caution on the part of those navigating said vessel, by reason of which said barge was sunk and totally lost and her cargo greatly damaged, but respondents deny that they abandoned said voyage or wrongfully, negligently, or unlawfully deviated therefrom, and allege their course and action in the premises was lawful, customary, and right and in accordance with the established usage of the trade in which they were plying, which usage was well known to libellants at the time of shipment of their goods, and that said goods were damaged and lost through one of the dangers of navigation within the exception of said bill of lading; that at the time of said accident and at all times prior thereto during said voyage the said steam vessel
28 "Iron Mountain" and said barge "Ironsides No. 3" were stout, staunch, and strong, well manned, tackled, appareled, and appointed, and said barge had her cargo well and sufficiently stowed and secured, and said vessels were in every respect fit for said voyage.

Fourth. Respondents do not admit but deny the allegations contained in the fourth paragraph of said libel, and do now allege in this connection that libellants' cause of action, if they ever had any, is stale and inequitable, and do now except to said libel, and ask this honorable court to dismiss the same for said reasons.

Fifth. As to the allegations contained in the fifth paragraph of said libel, respondents say it is true that respondents' agents did all in their power to save and reclaim libellants' goods, but as to the value of such goods as were lost or of such as were reclaimed or the quantity thereof respondents have no knowledge.

Sixth. Respondents admit that no portion of libellants' claim has been paid, but deny that any such claim rightfully or legally exists.

Seventh. The allegations in the seventh paragraph are true unless it be the allegation that respondents' vessels were common carriers, which respondents are advised is a question of law; and as to the whereabouts of respondents' barge "Ironsides No. 3," they say said barge is lying in the Ohio river at the point where she struck upon said trip, and is a total loss and wreck.

29 Eighth. Respondents deny the allegations in the ninth paragraph of said libel, except as to the jurisdiction of this honorable court.

Wherefore respondents pray your honors to dismiss said libel and permit them to depart hence with their costs so unjustly incurred in this behalf.

R. C. GRAY,
For Himself and Other Respondents.

KNOX & REED,
Proctors for Respondents.

WESTERN DISTRICT, *ss:*

R. C. Gray, being duly sworn, says the facts in the above answer contained are true, to the best of his knowledge, information, and belief.

R. C. GRAY.

Sworn to and subscribed this 19th day of March, 1880.
S. C. McCANDLESS,
Clerk U. S. Dist. Court, W. D. Pa.

Indorsement: No. 9. May term, 1880. Admiralty *in personam*. Hostetter & Smith *v.* R. C. Gray *et al.* Answer. Filed March 9, 1880. S. C. McCandless, clerk.

30 *Supplementary and Amendatory Libel.*

United States District Court, Western District of Pennsylvania.
May Term, 1880.

D. HOSTETTER and GEORGE W. SMITH, Libellants,
versus
R. C. GRAY *et al.*, Respondents. } No. 18.

To the Honorable Marcus W. Acheson, judge of the above-named court:

The supplementary and amendatory libel of D. Hostetter and Geo. W. Smith against R. C. Gray and others, at No. 18, May term, 1880, alleges as follows: That since the filing of said libel and the awarding of process on the 6th day of March, 1880, libellants have been informed, and believe the information to be true, that the sinking of said barge "Ironsides No. 3" was the result of careless and negligent management on the part of the agents and employés of respondents, and that it was not the result from obstruction in the river, but was

caused by said barge being overloaded on the port side with sacks of corn while at the landing known as New York Landing, said sacks of corn being placed on board in a great hurry, and the barge grounded thereby, so that it was with difficulty she was pulled off by said steam tug, and when pulled off the shore she commenced to lurch or careen to the port, causing the cargo of corn, which was
31 simply piled into the barge and not stowed at all, to slide or fall to that, the port or larboard side, when a break in the cargo, box, or hulk of said barge occurred, and she soon after sunk in deep water; that at the time of said sinking said steam tug and barge had not rounded out and headed down stream towards the port of destination, but that they were either headed up stream or across the stream, and were not under way upon a return to Mt. Vernon; that one Joseph Sommers, the mate of said tug boat, was at the time of said loading of sacks of corn cautioned as to the manner of placing it on board, but made reply that they were in a hurry to get back to Mt. Vernon, and that he would have it fixed or stowed properly so soon as they got under way, and that when said barge began to sink said mate ordered the corn to be carried from the port to the starboard side, but that it was too late, and only a few sacks could be so changed or carried before the men were obliged to go on board the tug in order to save themselves from being drowned. Libellants are informed and believe and expect to be able to prove all the foregoing facts, and that the loss and damage sustained by them was the result not only of deviation from the voyage undertaken, but that respondents, through their agents and employés, were guilty of gross negligence, carelessness, and undue haste
32 in the manner of loading said barge, and causing her to sink, and that they did not observe ordinary care, and they therefore pray this honorable court to be allowed to add this supplement and amendment to their original libel filed, and to make it a part thereof; and they will ever pray.

D. HOSTETTER.

Affirmed and subscribed this 24th day of March, 1880.

S. C. McCANDLESS,
Clerk U. S. District Court.

And now, to wit, March 31, 1880, proctors for libellants move the court for leave to amend their libel by adding the within to their original libel, and it is ordered that same be filed and motion be set down for hearing.

By the court.

April 7, 1880, amendment allowed.

By the court.

Indorsement: U. S. district court. In admiralty. No. 9. May term, 1880. D. Hostetter & Geo. W. Smith *vs.* R. C. Gray *et al.* Supplemental and amendatory libel. Filed March 13, 1880, at 11 a. m. A. H. Clarke, S. A. Will.

33 *Answer to Supplemental Libel.*

United States District Court, Western District of Pennsylvania.
May Term, 1880.

D. HOSTETTER and GEORGE W. SMITH
versus
R. C. GRAY *et al.* } No. —.

To the Hon. M. W. Acheson, judge of said court:

The answer of R. C Gray for himself and his co-respondents to the supplemental and amendatory libel of the libellants says:

That it is not true, as in said supplemental libel alleged, that the sinking of the barge "Ironsides No. 3" was the result of careless and negligent management on the part of the agents and employés of respondents. On the contrary, said loss was caused by one of the dangers of navigation within the exception of the bill of lading and without the fault, omission, or negligence, want of care or skill, upon the part of the respondents or their agents or employés, and occurred as in respondents' answer to the original libel is set out; nor is it true that said loss was the result of any improper stowage of cargo, but, on the contrary, her cargo was well and sufficiently stowed and secured, and said vessel was in every respect stout, staunch, and strong, as in said answer set out.

34 Respondents deny all and singular the averments in said amended or supplemental libel contained imputing to respondents or their agents and employés want of care or skill in the premises.

Wherefore respondents pray your honor to dismiss said original and supplemental libels and award to respondents their costs so unjustly incurred in this behalf.

R. C. GRAY.

Sworn and subscribed before me this 28th day of April, 1880.
S. C. McCANDLESS,
Clerk U. S. District Court,
Per GOODENOUGH.

KNOX & REED,
Proctors for Respondents.

Indorsement: U. S. district court. No. 9. May term, 1880. Admiralty. Answer to supplemental libel. Filed April 28, 1880. S. C. McCandless, clerk. Knox & Reed.

35 *Opinion of the Court.*

In the District Court of the United States for the Western District of Pennsylvania. May Term, 1880. In Admiralty.

HOSTETTER & SMITH
vs.
R. C. GRAY *et al.* } No. 9.

ACHESON, *D. J.:*

On December 6, 1874, the steam tow-boat "Iron Mountain," having in tow several barges (one called "Ironsides No. 3"), partly loaded with a miscellaneous cargo, left Pittsburgh bound for New Orleans. The libellants shipped by the barges 2,000 boxes of bitters and eighteen boxes of show-cards, which were placed on "Ironsides No. 3," the bill of lading stipulating that the goods were "to be delivered without delay, in like good order, at the port of New Orleans, La., the dangers of navigation, fire, and unavoidable accidents excepted." At the argument it was claimed in behalf of the libellants that there was a verbal agreement touching the course of transportation additional to the bill of lading, but the libel itself asserts that in "confirmation of said agreement" the bill of lading was signed, and the evidence fails to establish such alleged verbal contract. The case stands upon the bill of lading.

36 The tow-boat and her barges, after taking on additional cargo at various intermediate places, arrived safely at Mt. Vernon, Indiana, 819 miles below Pittsburgh, and landed to take on freight at the Mt. Vernon wharf-boat. The proprietors of the wharf-boat had engaged for the barges corn, which lay piled in sacks at two or three farm landings on the Indiana shore, the furthest pile being about two miles above the wharf-boat. The tow-boat detached from the fleet the barge "Ironsides No. 3," which was but partly loaded, and proceeded with it up stream to these piles. After loading this corn the boat crossed the river with the barge and took on corn which was offered at two landings on the Kentucky side, viz., New York Landing, about three miles above the wharf-boat, and Whitmon's Landing, which is somewhat lower down. After taking on the corn at Whitmon's the tow-boat started to return to her fleet, but while rounding out in the river the barge suddenly took water and soon sunk, becoming a total wreck, the cargo, including the libellants' goods, sustaining great damage. This occurred late in the evening of December, 1874. The protest, signed by the officers and some of the crew, and executed December 23, 1874, assigns as the cause of the disaster that the boat struck some unseen obstruction.

37 Immediate notice by telegram of the sinking of the barge with their goods was given the libellants.

The libellants brought no suit until March 4th, 1880, when they filed the libel in this case against the surviving owner and the executors of a deceased owner of the tow-boat and barges *in personam.*

The original libel set forth that the barge "struck some unseen obstruction, as the libellants are informed and believe," and the only ground of liability therein alleged is that of wrongful deviation in returning upstream to New York Landing after safe arrival at Mt. Vernon.

In their answer the respondents denied that their course of action complained of was a deviation, and averred that it was lawful, customary, and right and in accordance with the established usage of the trade in which they were plying. After this answer was filed the libellants, on March 31, 1880, filed an amended libel, in which they allege that since the filing of their original libel they had been informed and believe that the sinking of the barge was not the result of an obstruction in the river, but was caused by reason of "the barge being overloaded on the port side with sacks of corn," the undue haste with which the barge was loaded, and the negligent and improper stowage of the corn thereon.

The case, therefore, as it now stands presents for solution
38 two main questions: First. Was there a deviation? Second. If not, was the sinking of the barge the result of one of "the dangers of navigation" and an "unavoidable accident" within the exception in the bill of lading or was it caused by reason of the negligence charged in the amended libel?

1. A deviation is a voluntary departure, without necessity or reasonable cause, from the regular and usual course of the voyage. Coffin *v.* Newburyport Marine Ins. Co., 9 Mass., 447. It is, however, no deviation to touch and stay at a port out of the course of the voyage if such departure is within the usage of the trade. Bentaloe *v.* Pratt, Wal. C. C. Rep., 58; Bulkley *vs.* Protection Ins. Co., 2 Paine C. C. Rep., 82; Thatcher *vs.* McCulloh, Olcott's Ad. R., 365; Oliver *vs.* Maryland Ins. Co., 7 Cr., 489, 491. Where a bill of lading provides that the goods are to be carried from one port to another a direct voyage is *prima facie* intended, but this may be controlled by usage. Thus where the bill of lading stipulated that the goods were to be transported from New York to Georgetown, in the District of Columbia, it was held that the vessel was justified by the usage of the trade in going to Norfolk to discharge freight, although it was thirty miles out of the direct course to Georgetown. Lowry *vs.* Russell, 8 Pick., 360. So it was held in Columbian Ins. Co. *vs.* Catlett, 12 Wheat., 383, 387, 388, that the true meaning of the policy there in
39 suit was to be sought in an exposition of the words with reference to the known course and usage of the West India trade, and that what delay at St. Thomas would constitute a deviation depended upon the nature of the voyage and the usage of the trade. After the explicit provisions of the contract usage is the predominating test as to deviation. Phillips on Insurance, section 980. And usage is the test of what belongs to the voyage and the proper course in prosecuting it (*ibid.*, sec. 1003). Established usages relating to a voyage are impliedly made part of the contract if nothing is expressed to the contrary. Gracie *vs.* Marine Ins. Co., 8 Cr., 75; Columbia Ins. Co. *vs.* Catlett, *supra*; Robinson *vs.* United States, 13 Wal., 366; Phillips on Insurance, sec 997.

These being recognized legal principles, our next inquiry is: How far are they applicable to this case? Numerous witnesses variously connected with the river trade and having large experience testify of their own personal knowledge that it has been the general usage since the commencement of the business of transporting merchandise on the Western rivers on boats towed by steam vessels, and constantly practiced, for such barges to take an additioual cargo along the rivers en route to the port of destination, and in so doing for the owners or agents of such vessels and barges to land and tie
40 up their tows at the more public or larger or safer landings and detach from the fleets a barge or barges and tow the same to the places in the vicinity, whether up, across, or down the stream, where cargo is awaiting shipment, and it is testified that such usage has thus prevailed at Mt. Vernon, Indiana, in respect to goods awaiting shipment at New York Landing and other neighboring points.

For example, Arthur J. Branch, the superintendent of the Evansville and New Orleans Barge Company, having testified to his connection with the Ohio-river trade for twenty years and his acquaintance with its usages, was asked this question: "Q. Suppose a steamboat with several barges in tow were to land at a port on the Ohio river and there find or ascertain that there was freight for her at three or four different landings within four or five miles above said port which she passed in coming down, what has been the custom with respect to taking such freight?" To which he replied: "A. It has been to leave the tow in the safest and most convenient landing and take one or two barges, as might be necessary, and go back. If we know when we pass the freight that we are to take it we go below to the nearest harbor for our tow and to save time and expense. It would not be good navigation to land with our whole tow at each landing for freight, and in many cases it would
41 be impossible to do so." (Printed ev., p. 71.) Wm. A. Page testifies: "Where there are several landings to make in the same neighborhood it is almost the invariable custom to tie up the tow and then go back with one barge for the freight. Wherever I have been and all along the Ohio, as far as my knowledge goes, this is the custom, and it is good, sound steamboat sense everywhere. This is the custom in the neighborhood of Mt. Vernon." (*Ibid.*, 92.) Henry H. Sholes says: "I have known that custom to exist twenty years—ever since I have been tow-boating. It has existed, to my knowledge, in the trade between Pittsburgh and New Orleans. It has been a general custom." (*Ibid.*, 152.)

John B. Hall, a wharf-boatman at Evansville, Indiana, speaking of the practice there, says: "A tow-boat coming down the river with four or five model barges and having several landings to make close together above would leave the bulk of the tow and go back up the river with the barge which was to receive the freight. This custom has prevailed all along the Lower Ohio ever since I have had anything to do with the river and before I went into business. The custom at Mt. Vernon has been the same as here. (*Ibid.*, 89.) George G. Grammer, the superintendent of the Evansville, Cairo

and Memphis Packet Company, testifies that at Evansville,
42 Mt. Vernon, and Shawneetown there are wharf-boats, and that it is an old custom for the farmers in the vicinity thereof to make contracts there for shipping their corn from their farm landings, and that it has been the common practice for tow-boats descending the Ohio to land at these wharf-boats and make fast the tow and take one of the barges out of the fleet and to the corn freight piles, and he adds, "I regard it as the safest for all interests concerned to select some good landing in the vicinity of these freight piles, either above or below, or at them, for that matter, and detach the particular barge they desire to load and move it separately to the freight piles. That would be safer, because a steamboat could handle one barge better than she can handle more than one, and very often the freight is in a shoal or ragged landing, and she can get there with one barge when she could not get there with more. That would be a much more speedy way of loading and more convenient. This is the custom at Mt. Vernon and other points on the Ohio river for loading barges." (*Ibid.*, 66, 67.) Enoch E. Thomas, who has been one of the proprietors of the Mr. Vernon wharf-boat for twenty-five years, testifies: "The boats generally come here with their barges, and when told of corn above here to be shipped they go back for the corn. This has been the general custom here. The corn above Mt. Vernon is, as a rule, owned by parties living here,
43 who make their shipping contracts with the boats on their arrival at this port. This custom has been observed by boats with barges partly loaded bound from Pittsburgh to New Orleans. This has been the custom ever since I have been on the river. Our shipments cover the river from Long's Landing to the mouth of the Wabash. Long's Landing is six miles above Mt. Vernon." (*Ibid.*, 80.) Similar quotations from the testimony of the respondents' other witnesses might be greatly multiplied were it deemed necessary.

The witnesses assign several reasons for the usage. The barges, they testify, can be more conveniently and economically handled and loaded singly than when together in the tow. A saving of time is also effected, as several barges can be loaded at different points simultaneously, a matter of much importance in a river like the Ohio, which is subject to sudden rises and rapidly falls; but the main reason is that the usage conduces to the safety of the whole fleet, and thus operates to the advantage of every party in interest. Upon this point the witnesses are very emphatic. Where freight is to be taken on at several points in the vicinity of such a good landing as that at Mt. Vernon they testify that it is much the safer course to land and leave the tow there and go back with a single barge than to land the entire fleet at the different points. To appreciate how heavy and hard to handle a tow of three or four barges
44 is we need but to recur to the official survey of the barge "Ironsides No. 3." (*Ibid.*, 121.) Her custom-house tonnage was 369; her carrying capacity, 700 tons; length, 150 feet; breadth, 31 feet; depth, 7 feet.

It is shown that there is a further and special reason for the

usage at Mt. Vernon. Ninety per cent. of the shipments in that vicinity consists of corn in sacks at different farm landings, which can be reached by a single barge when it is often impossible to land the whole tow. The only reasonably practical way the farmers have to get their corn to market is by barges brought to their private landings. To haul the grain to the wharf-boat at Mt. Vernon would cost as much as the freight charges to New Orleans. (*Ibid.*, 70, 73, 85.)

To disprove the alleged usage the libellants examined a large number of witnesses. Their testimony, however, is principally of a negative character. They say they do not know of any such usage, but, with rare exceptions, they expressly disclaim familiarity with the usages of the trade. They are simply ignorant upon the subject and confess their ignorance. Thus the following is found in the cross-examination of Charles A. Ault, a witness for the libellants: Q. "Do you pretend to be at all familiar with the customs of navigation with respect to steamboats or barges receiving and discharging freight between their terminal points?" A. "I do
45 not." Q. "Such a custom then as you have been asked about might exist without your knowing anything about it, might it not?" A. "Yes, sir; it might exist without my knowing anything about it." (*Ibid.*, 219.)

And so F. A. Bacon, being cross-examined as to the alleged usage at Evansville and Mt. Vernon in respect to corn shipments, answered: "I know nothing about that matter. * * * That may have been the universal custom without my knowledge." (*Ibid.*, 329.)

Upon a careful scrutiny of the evidence it will be found that the admitted want of knowledge touching the barge trade on the part of the libellants' witnesses generally is such as to deprive their testimony of force.

Several of the libellants' witnesses, however, state that they have knowledge or information that the usage in question is pursued by barges towed by steam vessels. The evidence submitted by the respondents in proof of the usage is positive, clear, and convincing, and, in my judgment, is not weakened nor is any doubt respecting it created by the testimony on part of the libellants.

The court therefore finds—first, that it has been the general usage in the Pittsburgh and New Orleans barge trade, coeval with the commencement of the business and constantly practiced, where cargo
46 is to be taken on, en route to the port of destination, at several points in the same neighborhood, to land and tie up the tow or fleet of barges at the more commodious and safer landing, and detach from the tow the barge or barges designated to receive such cargo, and tow the same to the several points where the cargo may be stored, whether up or down stream or across the river; second, that at the time of the sinking of the barge "Ironsides No. 3" it was the general and established usage for barges towed by steam vessels in the Pittsburgh and New Orleans trade having cargo to receive at New York Landing and other points between there and Mt. Vernon, Indiana, to land and tie up the fleet at the latter place and tow back for such cargo the barge upon which it was to be

placed, and that the course pursued by the "Iron Mountain" on the occasion in question was in conformity with such usage of the trade; third, that the usage so practiced at Mt. Vernon and elsewhere, as mentioned in the foregoing findings, tends to cheapen the cost of transportation, facilitates business, and conduces to the safety of the whole tow, and is, therefore, a reasonable usage.

Applying, then, to these facts legal principles already discussed, I am of opinion that there was no deviation. When the barge "Ironsides No. 3" was detached from the tow and taken to the several landings on the Indiana and Kentucky shores it was to get
47 cargo, a purpose connected with the voyage. The "Iron Mountain", was never beyond sight of her tow, and, commercially considered, kept within the port of Mt. Vernon, according to the testimony of George W. Thomas. (*Ibid.*, 82.) The expert testimony clearly shows that in landing at Mt. Vernon and there leaving the bulk of her tow and taking back a single barge for cargo her course was prudent and proper.

2. The cotemporaneous declaration in the protest as to the cause of the sinking of the barge remained unchallenged for a period of five years and three months, and the original libel, verified by affidavit, ascribed the loss to the same cause. That it was not filed without an investigation of the facts may well be assumed. Indeed, the statements of the libel plainly imply that the libellants were then possessed of information as to "all the particulars of the sinking of the barge." Death had removed S. L. Summers, the mate under whose supervision the corn was loaded and stowed on the barge, and whose testimony was of the *last* importance. These things are to be borne in mind when we enter upon the inquiry as to the truth of the specific charge of negligence first made in the amended libel and the barge sunk by reason of improper loading and stowage.

To sustain this charge the libellants examined eight deck
48 hands, viz: Krumm, Reily, John and James H. Dunn, Martin, Leonard, Starke, and Tolen, and Anderson, a stevedore. Anderson says the barge listed at New York Landing and, indeed, was not trim when she went up. Herein, however, he is contradicted by Martin, who testifies the barge was all right at New York Landing and when she left there. The opinion Anderson undertakes to express as to the cause of the sinking I regard as entirely worthless. He did not see her sink and left her at New York Landing. I do not understand him to have been at Whitmon's at all. He admits he has had no experience with barges.

Nothing in the testimony of Krumm or Tolen tends to show that the barge was overloaded on the larboard side or the corn improperly stowed. On the contrary, the testimony of both these witnesses, I think, strongly disproves the allegations of the amended libel. Krumm says, "When we carried the corn on the barge I think we carried the corn as much on the one side as the other." He also states it was when the barge got out into the river "she capsized a little on one side" and not when she commenced to back out, and that she did not careen enough to take water over her deck. The

testimony of this witness throughout, in my judgment, tends to show that the cause of the sinking was as claimed by the respondents.

Tolen testifies: "We stowed the corn in piles along the sides
49 of the boat and amidships at both places. We put as much on one side as the other, as far as my knowledge goes." He further states—in this contradicting other of the libellants' witnesses—that all the corn was stowed away except "a few sacks, probably a hundred." In his examination-in-chief he states: "As she was backing out she hit a snag or sprung aleak; I could not say which. We put a syphon in her and started to put another syp-on in her, and before we got it done she was sunk." He says she was a good barge and there was nothing wrong with her, so far as he knew. On cross-examination he was asked, "Could she have sunk in so short a time by reason of any ordinary leak not caused by striking some object?" To which he replied, "Not to the best of my knowledge; she would not have sunk with*ing* having struck a snag or having sprung more than an ordinary leak;" and he significantly added, "There was — to cause her to spring more than an ordinary leak unless she struck something. She must — had a very big hole in her bottom to have sunk in that short time." This, be it remembered, comes from the libellants' own witness. His testimony has peculiar value as that of one who has had a steamboat experience of fifteen years and is by occupation a sailor. I think no one, after reading this man's testimony, can accept the theory
50 of the loss upon which the libellants now insist.

At least two of the other six deck hands who testified in behalf of the libellants were without experience on the river. The individual stories of several of these witnesses are confused and lack coherency. They differ among themselves as to important particulars, and in some very essential matters their testimony is conflicting. For example, Stark and James H. Dunn say the corn taken on at New York Landing and Whitmon's was not stowed at all. On the other hand, Martin says the corn taken on at both places was stowed as received, and he describes minutely in what manner. Again, James H. Dunn testifies, "The water that sunk the barge came over her side and from there ran over her hold." On the contrary, Leonard testifies: "I rather think the water that sunk her came in from the bottom, as there was water on the donnage when we went down to move the freight. There was half an inch or so of water on the donnage at that time. * * * She took water very rapidly after I got out of the hold, as she sunk in three minutes after." Five of these witnesses express the opinion that the barge sunk on account of improper loading, but they hardly agree as to what the precise negligence was. The accident, it must be observed, happened after nightfall and suddenly. It is quite plain these witnesses at the
51 time were greatly excited. Called upon to testify nearly six years after the occurrence, their opinions are to be received with allowance. They are probably very honest in their opinions, but after a very careful consideration of the whole evidence I am persuaded they are mistaken.

It clearly appears the barge was not overloaded. Indeed, she was

not nearly loaded up to her full capacity. She was well built, strong, staunch, and in perfect order. The mate who superintended her loading on this occasion, now, unfortunately, dead, is spoken of by the witnesses as a competent and trustworthy officer. The respondents examined Wm. C. Gray, the captain of the tow-boat Henry H. Sholes, the receiving clerk, and Joseph H. Dunlap, the agent of the "Iron Mountain" Barge Line. These witnesses have had long experience on the river, are intelligent and disinterested, and I have no reason to doubt the truth of their statements of fact. They severally testify that the barge was loaded in the usual manner and properly, and that the corn, save a few sacks, not exceeding a hundred, was regularly stowed away before they left Whitmon's, and the barge was then trim. Sholes and Dunlap testify that they went into the cabin of the tow-boat and sat down at a table to figure up the quantity of corn taken aboard. While thus engaged they felt a jar or shock as though the boat had struck something. Captain
52 Gray, who was then on deck of the tow-boat, says "the barge made a sudden, crushing lurch," and again he describes the shock as a "concussion, blow, or crush." Dunlap and Sholes hastened out, and heard some of the men say the barge had struck something and was taking water. Both went on the barge and Dunlap into the hold. They found she was taking water in her hold rapidly. No water was coming over the deck. Sholes said he heard the water "rushing into the hold." A syphon pump was put into the hold and set to work.

Captain Gray states that after the concussion the barge righted temporarily, and for probably five or six minutes there was nothing unusual in her shape. He went into the hold and heard that water coming in below the dunnage and back of the wing tiers of the stowage. He says he "heard it rush behind the cargo." Efforts were made to get at the break by removing the cargo, but before this could be accomplished the water came over her dunnage and caused the barge to list badly, and the men were ordered out of the hold, the peril becoming so great. It is needless to prolong this opinion by further citations from the proofs. Suffice it to say I am satisfied from the whole evidence the sinking of the barge occurred by reason of the cause alleged by the respondents.

53 The court finds, fourth, that while the steam tow-boat "Iron Mountain," with the barge "Ironsides No. 3" in tow, was backing out from Whitmon's Landing and when out in the river the barge struck some unmarked, unknown, and hidden object below the surface of the water, which caused her to take water and sink, and this without negligence on the part of the tow-boat or on the part of the owners of the tow-boat and barge, their agents or servants, and that it was an unavoidable accident.

That the loss so occurring is within the exception of the bill of lading is quite clear. Transportation Company *vs.* Downer, 11 Wal., 129; The Favorite, 2 Bissel, 502; Williams *v.* Grant, 1 Conn., 487.

Let a decree be drawn dismissing the libel with costs.

Indorsed as follows: No. 9. May term, 1880. In admiralty. U.

S. dist. court, W. D. of Pa. Hostetter & Smith *vs.* R. C. Gray *et al.* Opinion of the court. Filed Feb'y 18, 1882.

54 *Decree of the U. S. District Court.*

District Court of the United States, Western District of Pa. May Term, 1880. In Admiralty.

HOSTETTER & SMITH
vs.
R. C. GRAY and ALEX. H. MILLER, W. A. CALDWELL, JAMES P. Donnell, and John G. Holmes, Executors of M. W. Beltzhoover, Deceased. } No. 9.

And now, February 20th, 1882, the above cause having come on to be heard upon the libel, answer, and proofs, and due consideration being had in the premises, it is, on motion of Knox & Reed, proctors for respondents, ordered, adjudged, and decreed that the libel be, and the same is hereby, dismissed with costs to the respondents, to be taxed by the clerk.

By the court.

Indorsed: No. 9. May term, 1880. In admiralty. U. S. district court, W. D. of Pa. Hostetter & Smith *vs.* R. C. Gray *et al.* Final decree. Filed Feb'y 20, 1882. Knox & Reed.

55 U. S. District Court, Western District of Pennsylvania. May Term, 1880. In Admiralty.

HOSTETTER & SMITH
vs.
R. C. GRAY *et al.* } No. 9.

And now, to wit, Feb'y 28th, 1882, on motion of A. H. Clarke, proctor for Hostetter & Smith, the said libellants have leave to appeal from the decree of this court against them dismissing the libel in this cause to the circuit court of the United States for the western district of Pennsylvania.

By the court.

Indorsed: No. 9. May term, 1880. In admiralty. Hostetter & Smith *vs.* R. C. Gray *et al.* Order granting appeal to U. S. circuit court. Filed Feb'y 28, 1882. A. H. Clarke.

56 U. S. District Court, Western District of Pennsylvania. May Term, 1880. In Admiralty.

HOSTETTER & SMITH
vs.
R. C. GRAY *et al.* } No. 9.

The libellants appeal from the decree of this court dismissing the libel in this case to the circuit court of the western district of Pennsylvania.

Feb'y 28, 1882.

A. H. CLARKE,
Proctor for Libellants.

To S. C. McCandless, Esq., clerk U. S. dist. c't.

I hereby accept service of the above notice of appeal.
Feb'y 28, 1882.

S. C. McCANDLESS,
Clk U. S. Dist. Court.

Indorsed: No. 9. May term, 1880. In admiralty. Hostetter & Smith *vs.* R. C. Gray *et al.* Notice of appeal. Filed Feb'y 28, 1882. A. H. Clarke.

57 U. S. District Court, Western District of Pennsylvania. May Term, 1880. In Admiralty.

HOSTETTER & SMITH
vs.
R. C. GRAY *et al.* } No. 9.

Whereas an appeal has been taken from the decree of this court made on the 20th day of February, A. D. 1882, dismissing the libel in the case by the libellants:

Now, therefore, the stipulators undersigned hereby stipulate in the sum of two hundred and fifty dollars to pay all damages and costs which shall be awarded against the said libellants, the present appellants, by the final decree rendered by the appellate court.

D. HOSTETTER,
CHAS. T. FRISBEE.

Taken and acknowledged this 28th day of Feb'y, 1882, as to Chas. T. Frisbee.

S. C. McCANDLESS,
Clerk U. S. Dist. C't, West. Dist. of Pa.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Chas. S. Frisbee, party to the above stipulation, being duly sworn, deposes and says that he is worth the sum of two hundred and fifty dollars over and above all his just debts and liabilities.

CHAS. S. FRISBEE.

Sworn & subscribed this 28th day of Feb'y, A. D. 1882.

S. C. McCANDLESS,
Clerk U. S. Dist. C't, West. Dist. of Pa.

Indorsed: No. 9. May term, 1880. In admiralty. Hostetter & Smith *vs.* R. C. Gray *et al.* Stipulation for costs. Filed Feb'y 28th, 1882. A. H. Clarke.

58 *Appeal to U. S. Circuit Court.*

Circuit Court of the United States, Western District of Pennsylvania.
May Term, 1880. In Admiralty.

HOSTETTER & SMITH, Appellants,
vs.
R. C. GRAY *et al.*, Appellees. } No. 9.

To the hon. the circuit court of the United States for the western district of Pennsylvania:

The appeal of the above-named appellants respectfully showeth—

That on the 4th day of March, 1880, said appellants exhibited their original libel and on the 24th day of said month their supplemental and amendatory libel in the district court for the western district of Pennsylvania, claiming from said appellees the sum of $10,182.76 and costs, and that *that* process issued thereon and was served upon said appellees, who answered said libel and amended libel, praying that the same might be dismissed, &c., as will more fully appear by reference to said libels and answers; that the cause came on to be heard before the Honorable Marcus W. Acheson, judge of the said district court, on the 24th day of December, 1881, upon the pleadings, depositions, and proofs of the respective parties, and the said judge thereafter, to wit, February 18, 1882, filed an opinion dismissing said libel with costs, and on the 20th day of said month of February, 1882, signed a decree in conformity with said opinion, as by reference
59 thereto will more fully appear; that the costs, amounting to $661.05, were duly taxed and paid by appellants, notice of appeal served on the clerk of said district court and filed, together with a stipulation for costs, &c.; that these appellants are desirous and insist that said decree is erroneous and not in conformity with the facts and the law in the case, and for these reasons they appeal from the whole of said decree to the next circuit court to be held in said district, and on said appeal they intend to have said cause heard anew on the pleadings and proofs adduced and on other allegations and proofs to be introduced in said circuit court.

And they pray that the record may be returned to the said circuit court and the said decree reversed, and that the said appell*ants* may be condemned to pay to the said appellants their said claim or demand, together with interest and costs.

A. H. CLARKE,
Proctor for Appellants.

Indorsed: District court of the U. S., western district of Pennsylvania. No. 9. May term, 1880. In admiralty. Hostetter & Smith, appellants, *vs.* R. C. Gray *et al.*, appellees. Appeal. Served on us by copy this 8th day of March, 1882. Knox & Reed, att'ys for R. C. Gray *et al.* Filed March 9, 1882. A. H. Clarke.

60 *Appellants' Facts and Conclusions of Law.*

In the Circuit Court of the United States for the Western District of Pennsylvania. Nov. Term, 1882. In Admiralty.

HOSTETTER & SMITH, Libellants, Appellants,
vs.
R. C. GRAY *et al.*, Respondents, Appellees. } No. —.

Libellants' counsel request the court to find the following facts and conclusions of law:

1st. That respondents advertised in the Pittsburgh Commercial-Gazette, Dec. 2d, 1874, the steamer "Iron Mountain and barges for New Orleans direct," and that they entered into a special contract with libellants, in addition to that contained in the bill of lading, for the transportation of their, libellants', goods, agreeing that said goods should be placed on board respondents' barge, on top of and complete the load, and that the barge was to go direct to New Orleans without delay.

2d. That respondents' steam tug left Pittsburgh Dec. 23, 1874, for New Orleans, having those barges in tow, one of which contained libellants' goods.

61 3d. That respondents' steam tug having said barges in tow arrived at Mt. Vernon, Indiana, in safety, but that the master or the superintendent, learning of additional cargo which could be procured at points above which had already been passed, detached the barge having libellants' goods on board from the other barges and deviated from the voyage undertaken by returning upstream four or five miles to New York Landing, Kentucky, and that such deviation was without the knowledge or consent of libellants, against the terms of the agreement of affreightment, and for the sole advantage and profit of respondents.

4th. That during said deviation the barge sunk and libellants' goods were damaged and lost.

5th. That libellants were not informed as to the particulars of said deviation and sinking till three or four years, and that the turning back was denied at the time or soon thereafter by respondents' superintendent.

6th. That it is not customary for through boats from Pittsburgh to New Orleans, being partly loaded at Pittsburgh, to turn back at grain landings in order to procure additional cargo, and that libellants had no knowledge, either actual or constructive, of any such pretended custom.

7th. That the testimony adduced does not show that a knowledge

of the so-called custom of deviation or turning back prevails
62 among either shippers or insurers at the termini of the voyage.

8th. That the remote cause of the sinking of the barge and loss of the goods was the deviation, and the proximate cause the negligent, improper, and hurried manner of loading and navigating or handling the barge.

And the court is asked to find the following conclusions of law:

1st. That respondents are liable because of their failure to comply with the terms of the special contract by loading the barge at Pittsburgh to its full capacity, putting libellants' goods on board last, and then proceeding to New Orleans direct.

2d. That respondents are liable because of their negligence in abandoning their voyage undertaken, breaking up the tow at Mt. Vernon, taking the barge with libellants' goods on board, deviating and going back over a portion of the voyage passed in safety, and in loading too heavily and hurriedly putting the barge off the shore, sinking or causing the loss.

3d. That the practice, as in this instance, by respondents of deviating or turning back from or to grain piles or landings on the Ohio river is not a custom or usage binding upon the through
63 shipper from Pittsburgh to New Orleans, and changing long-established rules of law.

4th. That even if a custom does prevail in the vicinity of Mt. Vernon to deviate or turn back upon a de-cending voyage it is only local, and cannot shift the responsibility from the carrier to the shipper or insurer.

5th. That the decree of the district court should be reversed and a decree entered for libellants, with costs.

Indorsement: U. S. circuit court, western district of Pa. In admiralty, upon appeal from district court. No. 3. Nov. T., 1883. Hostetter & Smith, libellants, appellants, *vs.* R. C. Gray, respondents, appellees. Appellants' facts and conclusions of law. Filed Nov'r 6, 1882. Clarke. A copy of the within served on us this 6th of November, 1882. Knox & Reed, attorneys for respondents.

64 *Findings of Facts, with Conclusions of Law.*

United States Circuit Court for the Western District of Pennsylvania.

DAVID HOSTETTER and GEORGE W. SMITH, Partners as Hostetter & Smith,

vs.

R. C. GRAY and ALEXANDER H. MILLER, W. A. CALDWELL, JAMES P. Donnell, and J. G. Holmes, Executors of M. W. Beltzhoover, Deceased.

On libel *in personam* in a cause of contract civil and maritime.

MAY 18, 1883.

This cause being heard and the matters fully considered, the court found the following facts, to wit:

1. On December 6th, 1874, the steam tow-boat "Iron Mountain," having in tow several barges (one called "Ironsides No. 3"), partly loaded with a miscellaneous cargo, left Pittsburgh bound for New Orleans. The libellants shipped by the barges 2,000 boxes of bitters and eighteen boxes of show-cards, which were placed on "Ironsides No. 3," the bill of lading stipulating that the
65 goods were "to be delivered without delay, in like good order, at the port of New Orleans, La., the dangers of navigation, fire, and unavoidable accidents excepted." A copy of the bill of lading is annexed to the original libel.

2. The tow-boat and her barges, after taking on additional cargo at various intermediate places, arrived safely at Mt. Vernon, Indiana, 819 miles below Pittsburgh, and landed to take on freight at the Mt. Vernon wharf-boat. The proprietors of the wharf-boat had engaged for the barges corn which lay piled in sacks at two or three farm landings on the Indiana shore, the furthest pile being about two miles above the wharf-boat. The tow-boat detached from the fleet the barge "Ironsides No. 3," which was but partly loaded, and proceeded with it upstream to these piles. After loading this corn the boat crossed the river with the barge and took on corn which was offered at two landings on the Kentucky side, viz., New York Landing, about three miles above the wharf-boat, and Whitmon's Landing, which is somewhat lower down. After taking on the corn at Whitmon's the tow-boat started to return to her fleet, but while backing out in the river the barge suddenly took water and soon sunk, becoming a total wreck, the cargo, including the libellants' goods, sustaining great damage. This occurred late in the evening
66 of December 18, 1874. A protest, signed by the officers and some of the crew, was executed December 23, 1874, assigning as the cause of the disaster that the boat struck some unseen obstruction. Immediate notice by telegram of the sinking of the barge with their goods was given the libellants.

3. That it has been the general usage in the Pittsburgh and New Orleans barge trade, coeval with the commencement of the business

and constantly practiced where cargo is to be taken on en route to the port of destination at several points in the same neighborhood, to land and tie up the tow or fleet of barges at the more commodious and safer landing, and detach from the tow the barge or barges designated to receive such cargo. and tow the same to the several points where the cargo may be stored, whether up or down stream or across the river.

4. That at the time of the sinking of the barge "Ironsides No. 3" it was the general and established usage for barges towed by steam vessels in the Pittsburgh and New Orleans trade, having cargo to receive at New York Landing and other points between there and Mt. Vernon, Indiana, to land and tie up the fleet at the latter place and tow back for such cargo, the barge upon which it was to be placed, and that the course pursued by the "Iron Mountain" on the occasion in question was in conformity with such usage of the trade.

67 5. That the usage so practised at Mt. Vernon and elsewhere, as mentioned in the foregoing findings, tends to cheapen the cost of transportation, facilitates business, and conduces to the safety of the whole tow, and is, therefore, a reasonable usage.

6. That while the steam tow-boat "Iron Mountain" with the barge "Ironsides No. 3" in tow was backing out from Whitmon's Landing, and when out in the river, the barge struck some unmarked, unknown, and hidden object below the surface of the water which caused her to take water and sink, and this, without negligence of the part of the tow-boat, or on the part of the owners of the tow-boat and barge, their agents or servants, and that it was an unavoidable accident.

The conclusion of law from the foregoing facts found is that the respondents were not liable to the libellants for the loss, damage, and injury complained of in the libel, and that the libel should be dismissed.

JOSEPH P. BRADLEY,
Circuit Justice.

Indorsement: No. 3. Nov'r T., 1882. Hostetter & Smith *vs.* R. C. Gray *et al.* Finding of facts, with conclusions of law thereon. Filed May 18, 1883.

68 *Decree Dismissing Appeal.*

Circuit Court of the United States, Western District of Pennsylvania.

HOSTETTER & SMITH *vs.* R. C. GRAY *et al.*

Appeal in admiralty.

And now, May 18, 1883, the above cause having come on to be heard upon the pleadings and proofs taken in the district court by appeal from the decree of said court, upon due consideration thereof,

it is now ordered, adjudged, and decreed that the libel be, and the same is hereby, dismissed at the cost of appellants.

By the court.

H. D. GAMBLE, *Clk.*

Indorsement: No. 3. Nov'r term, 1882. Hostetter & Smith *vs.* R. C. Gray *et al.* Decree dismissing libel. Filed May 18, 1883.

69 *Suggestion of Death of One of Libellants.*

In the Circuit Court of the United States for the Western District of Pennsylvania. November Term, 1882. In Admiralty.

HOSTETTER & SMITH, Libellants and Appellants,
versus
R. C. GRAY *et al.*, Respondents and Appellees. } No. 3.

And now, to wit, May 8, 1885, comes A. H. Clarke, proctor for libellants, and suggests the death of Geo. W. Smith, which occurred October 30, 1884, and the substitution of David Hostetter, surviving partner of the above-named firm, as libellant.

A. H. CLARKE,
Proctor, &c.

Indorsement: No. 3. Nov'r term, 1882. Hostetter & Smith, libellants, &c., *vs.* R. C. Gray *et al.*, respondents, &c. Suggestion of death of Smith and substitution of Hostetter, surviving partner. Filed, by leave and direction of court, this May 8, 1885. H. D. Gamble, clerk. A. H. Clarke.

70 *Appeal to U. S. Supreme Court.*

In the Circuit Court of the United States for the Western District of Pennsylvania. November Term, 1882.

DAVID HOSTETTER, Surviving Partner of Hostetter & Smith,
Libellant & Appellant,
vs.
R. C. GRAY *et al.*, Respondents & Appellees. } No. 3.

The appeal of David Hostetter, surviving partner of Hostetter & Smith, the above-named claimant and appellant, respectfully showeth that on March 5, 1880, his late firm of Hostetter & Smith filed their libel *in personam* in the district court of the U. S. for the western district of Pennsylvania against R. C. Gray *et al.*, respondents in a cause civil and maritime, for the recovery of the sum of $10,183.76 and interest, alleged to have been sustained by the negligent sinking of the barge "Ironsides No. 3" and the destruction of goods owned by libellants which were shipped from Pittsburgh to New Orleans and lost during a deviation from the voyage, &c., as fully set forth in said libel and the supplement thereto; that said libel and sup-

plement were duly answered and such proceedings had thereon
71 that on the 18th day of February, 1882, the hon. the judge of the said court filed an opinion dismissing said libel, &c., and that after said opinion and decree thereon an appeal was taken to the circuit court of the western district of Pennsylvania and there argued, and that afterwards, to wit, on the 18th day of May, 1883, a decree was entered dismissing said libel at the cost of appellant.

Wherefore the said appellant appeals from said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the decree of said circuit court and that the libel and supplemental libel, the answers, pleadings, requests for findings of fact, and conclusions of law, exceptions, &c., in said cause may be sent to the said Supreme Court of the United States without delay, and the said Supreme will proceed to hear the said cause anew, and the said decree of the circuit court may be reversed and a decree entered sustaining said libel, &c., and such other decree as to said Supreme Court shall seem just.

Pittsburgh, May 8, 1885.

D. HOSTETTER.

A. H. CLARKE,
Proctor for Appellant.

And now, May 8, 1885, the foregoing appeal allowed.
By the court.

Indorsement: No. 3. Nov'r term, 1882. David Hostetter, libellant, *vs.* R. C. Gray *et al.* Appeal to U. S. Supreme Court, with allowance thereof. Filed May 8, 1885.

72 *Bond on Appeal.*

Know all men by these presents that we, David Hostetter, principal, and Chas. S. Frisbee and R. S. Robb, sureties, all of the city of Allegheny, county of Allegheny, and State of Pennsylvania, do bind ourselves, our heirs, executors, and administrators, to well and truly pay or cause to be paid unto R. C. Gray, his heirs, executors, and administrators, A. H. Miller, W. A. Caldwell, James P. Donnell, and J. G. Holmes, ex'rs of M. W. Beltzhoover, deceased, or their successors, the sum of one thousand dollars, lawful money of the United States, firmly by these presents.

Sealed with our seals and dated at Pittsburgh this 12th day of May, A. D. 1885.

Whereas lately at a session of the circuit court of the United States for the western district of Pennsylvania, in a suit depending in said court between David Hostetter, surviving partner of the firm of Hostetter & Smith, libellants, and R. C. Gray and A. H. Miller, W. A. Caldwell, James P. Donnell, and J. G. Holmes, executors of M. W. Beltzhoover, deceased, owners of the steam tug "Iron Mountain" and barge "Ironsides No. 3," a final judgment and decree was rendered against the said David Hostetter, surviving partner of the firm of Hostetter & Smith.

And whereas David Hostetter, surviving partner of the firm of Hostetter & Smith, has obtained an appeal to remove said cause to the Supreme Court of the United States:

73 Now the condition of this obligation is such that if the said David Hostetter, appellant, shall prosecute his appeal to effect and answer all costs that may accrue against or be charged to him if he fail to make his plea good, then this obligation to be void; otherwise to be and remain in full force and virtue.

Witness our hands and seals this 12th day of May, A. D. 1885.

D. HOSTETTER. [SEAL.]
CHAS. S. FRISBEE. [SEAL.]
R. S. ROBB. [SEAL.]

Signed and sealed in presence of—
A. H. CLARKE.

Indorsement: No. 3. Nov'r term, 1882. David Hostetter *vs.* R. C. Gray *et al.* Filed May 12, 1885.

And now, May 12, 1885, the within bond approved by the court.

74 *Assignments of Error.*

In the United States Supreme Court. October Term, 1885. In Admiralty.

HOSTETTER & SMITH, Libellants and Appellants,
vs.
R. C. GRAY *et al.*, Respondents and Appellees. } No. —.

Appeal from the U. S. circuit court, western district of Pennsylvania, No. 3. November term, 1882. In admiralty.

1st. The court erred in the conclusion of fact "that it has been the general usage in the Pittsburgh and New Orleans barge trade, coeval with the commencement of the business and constantly practiced, when cargo is to be taken on en route to the port of destination at several points in the same neighborhood to land and tie up the tow or fleet of barges at the more commodious and safer landings and detach from the tow the barge or barges designated to receive such cargo and tow the same to the several points where the cargo may be stored, whether up or down stream or across the river," because there is not any proof that such pretended usage is "constantly practiced" — because this conclusion of fact is too

75 indefinite. There is no evidence to prove that any barge deviated by going back down stream to procure additional cargo while "en route" from New Orleans to Pittsburgh. The evidence does not show that any barges or boats "en route" from Pittsburgh to New Orleans, and partly loaded at the former place with cargo for New Orleans, have ever deviated or returned upstream for additional cargo or for any cause whatsoever, except the barge

of respondents at the time of the sinking and loss for which this cause was instituted, so that in point of fact it was not a custom. The evidence only shows an occasional deviation with empty barges, so that through shippers are subjected to no risk whatever.

2d. The fourth finding of fact that at the time of the sinking of the barge "Ironsides No. 3" it was the general and established usage for barges towed by steam vessels in the Pittsburgh & New Orleans trade having cargo to receive at New York Landing and other points between there and Mt. Vernon, Indiana, to land and tie up the fleet at the latter place and tow back for such cargo the barge upon which it was to be placed, and that the course pursued by the Iron Mountain on the occasion in question was in conformity with such usage of trade" is also erroneous: 1st, it assumes that Mt. Vernon is a safer landing than New York landing, of which
76 all the proof is to the contrary and as is clearly shown by the Government survey, marked as an exhibit in this case; 2d, it assumes a knowledge of cargo at New York Landing before reaching Mt. Vernon, of which there is not any proof whatever. The testimony only shows that after arriving at Mt. Vernon the master was solicited to go back upstream to New York landing.

3d. The conclusion of law by which the pretended custom of deviation or subjecting the through shipper to an unlimited peril is legalized is manifestly error, because it is against public policy, vicious, indefinite, uncertain, undeterminate, and vague, and for these reasons ought not to prevail.

4th. The rules of court require libellants to file requests for findings of fact and of law, which rule was complied with, yet the court neglected to pass upon said requests for findings, either by refusing or allowing them or any of them, which is now excepted to as error.

5th. The court erred in dismissing the libel with costs.

A. H. CLARKE,
Proctor for Libellants and Appellants.

Indorsed: U. S. Supreme Court. No. —. Oct. T., 1885. In admiralty. Hostetter & Smith, libellants and appellants, *versus* R. C. Gray *et al.*, respondents & appellees. Assignments of error. Filed Sept. 29, 1885. A. H. Clarke.

77 WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

In the Circuit Court of the United States for the Western District of Pennsylvania. Nov'r Term, 1882.

HOSTETTER & SMITH
vs.
R. C. GRAY *et al.* } No. 3.

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and forego-

ing pages contain a true copy of the record and proceedings in the above-entitled case so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 5th day of October, A. D. 1885.

[Seal of the U. S. Circuit Court, W. D. Penn.]

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, M. W. Acheson, judge of the United States district court for said district, presiding in the U. S. circuit court, do hereby certify that H. D. Gamble above named was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

Pittsburgh, October 5th, 1885.

M. W. ACHESON,
Judge Presiding in the U. S. Circuit Court.

[Endorsed:] No. —. — term, 18—. —— —— *vs.* —— ——.

78 UNITED STATES OF AMERICA, } *sct:*
Western District of Pennsylvania, }

To R. C. Gray and Alexander H. Miller, W. A. Caldwell, James P. Donnell, and J. G. Holmes, executors of M. W. Beltzhoover, deceased, late owners of the steam tug "Iron Mountain" and barge "Ironsides No. 3, Greeting:"

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the United States circuit court, wherein David Hostetter, surviving partner of the firm of Hostetter & Smith, libellant, is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 18th day of Sept., 1885.

[Seal of the U. S. Circuit Court, W. D. Penn.]

M. W. ACHESON,
Judge of U. S. Circuit Court.

Attest: H. D. GAMBLE,
Clerk U. S. Circuit Court, West Dist. of Pa.

Service accepted this 19th day of Sept., 1885.

KNOX AND REED,
Per C. S. C.

[Endorsed:] No. —. —— term, 18—. —— —— *vs.* —— ——. Citation.

Endorsed on cover: W. Pennsylvania C. C. U. S. No. 344. David Hostetter, surviving partner of the firm of Hostetter & Smith, appellant, *vs.* R. C. Gray and Alexander H. Miller, W. A. Caldwell, James P. Donnell, and J. G. Holmes, executors of M. W. Beltzhoover, deceased. Filed October 7, 1885.

Office Supreme Court U. S.
SEP 11 1888
ES, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1887, No. ~~344~~ 79.

DAVID HOSTETTER, Surviving Partner of the firm of HOSTETTER & SMITH, Appellants,

vs.

R. C. GRAY AND ALEXANDER MILLER, W. A. CALDWELL, JAMES P. DONNELL AND J. G. HOLMES, Executors of M. W. BELTZHOOVER, Deceased.

Appeal from the Circuit Court of the United States for the Western District of Penn'a.

IN ADMIRALTY.

BRIEF OF APPELLANT.

A. H. CLARKE,
Proctor for Appellant.

PERCY F. SMITH, PRINT

Supreme Court of the United States.

OCTOBER TERM, 1887, No. 344.

DAVID HOSTETTER, Surviving Partner of the firm of HOSTETTER & SMITH, Appellants,

vs.

R. C. GRAY AND ALEXANDER MILLER, W. A. CALDWELL, JAMES P. DONNELL AND J. G. HOLMES, Executors of M. W. BELTZHOOVER, Deceased.

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STATEMENT OF THE CASE.

Appellees' steam tug "Iron Mountain" left Pittsburg for New Orleans Deeember 6, 1874, having in tow (according to the *Protest,*) three barges, the "Ironsides No. 3," which took on about 500 tons of general merchandise, and the "Giant No. 2," and "Ironsides No. 4," both fully loaded. The tug and barges arrived at Mt. Vernon, Indiana, safely, where the master, learning of additional cargo which could be procured at landings already passed, detached the barge "Ironsides No. 3," upon which had been loaded appellant's goods at Pittsburg, consigned to New Orleans, from the other barges and towed it up stream to landings on the Indiana side of the river, took on board from four to six hundred sacks of corn, and while thus engaged application was made for the barge to go still further up the stream, and to the Kentucky side, to New York Landing, which is five miles by water and four by land above Mt. Vernon, the point turned back or deviated from, with an intervening sand bar. The tug and barge proceeded on up stream to New York Landing, and loaded about 1,500 sacks of corn, then dropped down a quarter or half mile to Whitmon's Landing, Kentucky, and loaded corn all day. In leaving Whitmon's December 18, 1874, by backing out (not *rounding out,* as stated in answer,) and before getting underway or even straightened down the river, the barge sunk. Nothing is said in the Protest executed at the time in reference to the urning back from Mt. Vernon, but it is therein stated that the steamboat "Iron Mountain" with "said barge in tow, was descending the river, and had reached a point about one mile below New York Landing, when said barge, it is supposed, struck some unseen obstruction, * * * and that the accident occurred as described and not otherwise."

Appellants in the suit instituted to recover for the value of their goods lost, charged breach of contract in the manner of loading the barge at Pittsburg, negligence in loading the corn and handling or navigating the barge, and *deviation.* Appellees admitted the fact of having turned back or deviated, bnt denied the other charges. It is claimed by Appellees that the deviation was sanctioned by custom and usage. The libel appears on pages 3, 4, 5 and 6, and supplemental libel on pages 14 and 15 of the Transcript of Record.

There is no contention regarding the value of the goods lost, to wit: $10,183.76.

The appeal was from the District to the Circuit Court, and to the Supreme Court.

BRIEF.

The questions to which appellants are presumably obliged to be confined, are: What constitutes a deviation; and what a custom or

usage, binding upon a shipper from Pittsburg to New Orleans direct.

Deviation is defined to be "a voluntary departure without necessity from the regular and actual course of the voyage."

It must be a necessity, otherwise the carrier is responsible.

The Delaware—14, *Wallace*, 579.

Park on Ins., 294.

Phœnix Ins. Co., vs. Cochran, 1 Smith, 154, (Pa.)

An unnecessary deviation would discharge the insurance.

Colls vs. Marine Ins. Co., 3 Wash., C. Ct., Rept., 159.

Davis vs. Jarrett, 6, Bing, 716.

The shortness of the time or *distance* of the deviation is *immaterial.*

Maryland Ins. Co. vs. Leroy, 7, Crauch, 30.

"The law appreciable to deviation applies equally to and is in full "force on all river and lake navigation."

Jolly vs. Ohio Ins. Co., Wright's Repts., 539, (O.)

"It matters not how short may be the deviation, nor how harm-"less, nor, indeed, does it aid that it should be shown the alteration "made a *safer voyage.*"

48, *N. Y.*, 571.

In *Brown vs. Tayleur*, 4 Addison & Ellis, 241, Coleridge says: "It makes a difference whether a ship stays at one place to load or goes on a *roving voyage to pick up a cargo.*" So in the case at bar. The carrier, after steaming *eight hundred and nineteen miles*, commences *a roving voyage to pick up a cargo.* Had the boat stopped at New York Landing, (and the Government survey clearly establishes the fact that it is a safer harbor than Mt. Vernon,) on her way down, appellants would have only been subjected to a single, instead of a three-fold risk. Appellees "fished" up stream from Mt. Vernon, and then "fished" down. It will be seen that the steamboat and barge were obliged to steam over a bar, and that in going into Whitmon's Landing a dangerous place was found, if the appellee's testimony be true.

The rule of law is that a ship must visit such ports in the geographical order of their distance from the port of departure.

Clason vs. Simmonds, 6 Term Rep., 553. 16 Pick., 303. 2 Johns, 264.

"It is his right and duty in an unforseen exigency when the safety "of the goods require it and the consent of the owner may be fairly "presumed, to deviate from the letter of instructions, and notify him "of such deviations; but when the deviation is unnecessary and for

"the mere convenience of the carrier he assumes the risk of conse-
"quent injury and remains responsible as an insurer."

Dwight Johnson vs. the N. Y. C. R. R. Co., 33 N. Y., 610.

The case of *Lowry vs. Russell*, 8 Pick., 360, is cited in support of a theory that a vessel may deviate as far as thirty miles from a direct course. In the above case the vessel was bound from New York to Georgetown, D. C. Put into Norfolk to discharge freight. Now, like Cairo for the New Orleans boats, Norfolk has always been a principal port to stop at for coasting vessels. Besides, it is fair to cite this case as one decided upon custom and usage alone, when it appears that another reason assigned in the opinion of the Court was that plaintiffs had notice when they shipped their sugar that the vessel was to stop at Norfolk, a painted sign was hung up in the shrouds, and she was duly advertised in two newspapers, one of which was taken by plaintiffs. Quite a contrast to the deviation in this case. Captain Dunlap denies it as a question of fact, and Captain Grammer says this turning back for freight is done "*in the night*," * * * * "and I have never consulted a shipper about it."

The Appellees have escaped by reason of having satisfied the Court below that this remarkable mode of navigation is a custom.

The learned Judge in the District Court in his opinion (p. 21) says the testimony of Appellants' witnesses "is principally of a negative character," (upon the question of custom.) In so finding he must have ignored the testimony of James Barnard, of the Board of Underwriters of St. Louis, an old steamboatman, James A. Bartlett, Vice-President of the Marine Insurance Co. of St. Louis, F. A. Bacon, T. W. Taylor, Charles H. Campbell, and many other Presidents and agents of insurance companies, marine adjusters, manufacturers and merchants in Cincinnati, Evansville and St. Louis, and were we permitted to read from the testimony it would surely satisfy this Court that said witnesses were well qualified to testify, and far better than the interested witnesses of Appellees, who practiced this manner of deviation for their own special profit.

What is necessary to constitute a custom binding upon a shipper at Pittsburg?

In "The Reeside," 2 *Sumner*, 567, and approved in Hone *vs.* Mutual Safety Insurance Co., 1 *Sandf.*, 137, Mr. Justice Story said: "I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business or trades to control, vary, or annul the general liabilities of parties under the common law as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstanding and misrepresentation and abuse.

It was held in *Simmons* vs. *Law*, 8 Bosw. (N. Y.) 213, that "evi-"dence of custom was inadmissible to give a construction to the bill "of lading in conflict with the obvious meaning of its language, or its "clear legal import." The bill of lading, in this case, states that the goods were to be delivered without delay at New Orleans.

Going out of the direct course for freight, *sometimes followed* and at others not, does not establish a usage which is binding.

Clason vs. Simmonds, Supra.

Morsden vs. Reed, 3 East, (K. B.) 577.

When parties in the same trade or business differ as to the existence of a custom it cannot be regarded.

Collings vs. Hope, 3 Wash. C. Ct. R., 149.

It must be known by those it will effect.

Adams vs. Otterback, 15 How, 539.

In the case at bar it is entirely optional with the carrier whether he will go back 5, 10, or 50 miles or not; hence invalid for uncertainty. To be binding it must be current, and not dependent upon the pleasure of whim of the carrier, consistent and reasonable.

"It should receive the tacit acquiescence of all classes engaged in "the trade which it is sought to effect and control."

Dixon vs. Dunham, 14 Ill. 324.

Acts of accommodation or indulgence do not constitute a custom. If two customs are contradictory or antagonistic, both cannot have been established by mutual consent.

Browne on Usage and Customs, 16.

Twenty instances may have occurred of vessels going from Kingston, Jamaica, to the island of Amber, and to Cora for mules, and then back to Amber, instead of going to Kingston, but *it is no proof of a usage.* It must be uniformly pursued, uniform and fixed.

Martin vs. Del. Ins. Co., 2 Wash. C. Ct., 255.

In Wayne *vs.* St. Bt. Genl. Pike, 16 Ohio, 425, testimony of merchants at *termini* of voyage to disprove usage of steamboat referred to: "*They never heard of any such custom, etc.*"

An unreasonable custom not sustained.

Coleman vs. Chadwick, 80 P. St., 81.

The rule that a custom must be certain and uniform is strictly applied to usage of trade.

Wallace vs. Morgan, 23 Ind., 399.

"A usage of trade to which no limit is assigned is bad."

Dunn vs. City of London Brewing Company,
L. R., 8 Eq , 155.

The so called custom of steaming up and down the river, indiscriminately, with goods shipped to go through *direct* to the terminus of the voyage, must surely be deemed "bad." There is apparently no limit to it.

Evidence of a custom in New Orleans, Cincinnati, and Louisville held not to be sufficient to prove a general custom of merchants upon the Mississippi River and its tributaries.

Walsh vs. Frank, 19 Ark., 270.

In 1 *Watts* (Pa.), 360, Chief Justice Gibson says: "Nothing should be more pertinaciously resisted than these attempts to transfer the functions of the judge from the bench to the witness stand, by evidence of customs in derogation of the general law, that would involve the responsibilities of the parties in rules whose existence perhaps they had no reason to suspect before they came to be applied to their rights. If the existence of a law be so obscure as to be known to the constitutional expositors of it only through the evidence of witnesses, it is no extravagant assumption to take for granted that the party to be affected was ignorant of it at the time when the knowledge of it wou'd have been most material to him; and to try a man's actions by a rule he had no opportunity to become acquainted with beforehand is the very worst species of tyranny."

In Strong vs. Grand Trunk Railway Co., 15 *Michigan*, 206, Cooley, C. J., said; "Special customs are so liable to create confusion of legal rules in directions not contemplated in their adoption, that they are admitted into law with great reluctance; and it is not often a hardship to parties to reject a custom so long as they are left free to make their own bargains, and can incorporate it in their contracts if they see fit."

"A custom to be valid in this country must be sufficiently ancient to be fully established and *known to all* who are to be bound by it." Same.

There is no proof Appellants had any direct knowledge of the so-called custom. Had they supposed their goods were to be subjected to the delay and increased risk, the presumption is they would have either shipped by rail, or insured. And "proof of knowledge as "a matter of fact is required to give effect to any and all particular "usages not of so general a nature as to permit a presumption of "knowledge."

Barrett vs Williamson, 4 McLean, 589.

In Steamboat "*Albatross*" *vs. Wayne*, 16 *Ohio Repts.*, 513, a contract made at Cincinnati, Ohio, for the delivery of goods at Memphis. The Court held a local custom at Memphis, regulating the mode of delivering goods is not binding on shippers at Cincinnati, Ohio, unless known to merchants and shippers there.

The Court further said: "That it could not, with any propriety, say, that a contract made at Cincinnati, Ohio, was made in reference to a custom unknown to one of the parties at that place, and unknown to those residing there and engaged in the Memphis trade. It is misapplying legal terms to call a local practice, not known to persons generally engaged in the Memphis trade, a usage, or a custom, or a general custom."

"But to give it this force, notoriety, uniformity, *reasonableness*, and public requiescence in it are requisite."

In *Wilson vs. Bauman*, 80 *Illinois*, 493, a usage of architects was attempted to be proved, and the defendant in the lower court was not allowed to show there was no such usage except by architects. This ruling was held to be error by the Supreme Court, and further held, "such customs must be as well known to builders and contracts as to architects."

To apply this rule it should have been shown shippers and insurers knew of such custom as well as carriers, but none were called by Appellees for that purpose.

The learned Judge of the District Court, in his opinion (page 19, of record,) quotes from the testimony in chief appellee's witness, Branch, in support of the theory of custom, or deviation, but it is hardly possible he could have noticed the cross-examination, for in that the witness says: "*I know of no case of Pittsburg freight*, (boat) *except the 'Iron Mountain.'* Those others were principally in the grain and salt business"—which was local. And Page, another witness quoted in said opinion, says on cross-examination: "*I cannot remember any boats loaded, or partly loaded, at Pittsburg going back up the river.*" The testimony at best only proved a local practice, indulged in by "hungry" steamboats, and even then they usually detached an empty barge and towed back up stream. How can such practices be considered as binding upon the through shipper from Pittsburg to New Orleans? Is not such a custom against public policy, pernicious and bad? If allowed to prevail it subjects the whole internal commerce of the west to the whims and caprices of common carriers, indulged in for their own private gains. What reasonable man would ship goods, or what insurance company take a risk thereon, were it known they were to be subjected to a roving voyage up and down the rivers *ad infinitum*.

A. H. CLARKE,
Proctor for Appellants.

IN THE

Supreme Court of the United States,

No. 3 OCTOBER TERM, 1890.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

IN ADMIRALTY.

D. HERBERT HOSTETTER, Administrator, &c., et al.

AGAINST

R. C. GRAY'S EXECUTORS, et al.

Appellants' Supplemental Brief of Authorities.

ALBERT H. CLARKE,
Proctor for Appellants.

PITTSBURGH:
EDWARD F. ANDERSON, BOOK AND JOB PRINTER, 99 FIFTH AVENUE.
1890.

IN THE

Supreme Court of the United States,

No. 3 OCTOBER TERM, 1890.

D. HERBERT HOSTETTER, ADMINISTRATOR,

AGAINST

R. C. GRAY'S EXECUTORS, *ET AL.*

APPELLANT'S SUPPLEMENTAL BRIEF OF AUTHORITIES.

The case of the Amazon Insurance Co. against the steamboat, Iron Mountain, reported in ——— *Insurance Reports*, vol. 6, decision by Swing, J., was brought to recover for the value of flour mentioned in the *pleadings* in the case at bar, in both libel and answer (pages 4 and 12 of Record), and therefore falling under the provisions of section 6, rule 8, of this court, as to review. It was founded upon a former trial before Judge Gresham, U. S. Circuit Court, at Evansville, in 1876, in which it was held that the boat returning "up the river * * * would void the policy," &c., and the insurance company having paid for the flour claimed to be subrogated to the rights of the shipper (plaintiff) as against the boat, exceptions were filed to the libel and overruled. The case before Judge Gresham is not reported, but reference is made to it in the Amazon Insurance case, *supra*, and to the fact of the deviation of usage and custom to support the deviation practiced. It will be noticed the flour was on the same barge with the goods of appellant herein. Appellant's counsel only discovered this case of the Ama-

zon Insurance Co. after arriving in Washington the 20th inst., but claims it as an adjudicated authority, bearing direct upon the case at issue, and entitled to consideration by this Honorable Court in its furtherance of a simple question of justice and equity.

As respects a special custom in a particular trade or between particular ports, even if there is a presumption that parties in the business contract in reference to the custom, this presumption is at best but a *prima facie* one liable to be rebutted by proof that it was unknown to the party against whom it is set up, and on the being so proved, no weight ought to be given to it. (Isakoson vs. Williams, 26 *Fed. Rep.*, 642.)

To permit usage to govern and modify the law in relation to the dealings of parties, it must be uniform, certain and sufficiently notorious to warrant the legal presumption that the *parties contracted* with reference to it. (Citizens Bank of Baltimore vs. Grafflins, 31 *Md.*, 507, I., 66.)

Mere opinions of individuals will not establish a usage or custom. (Marine Nat. Bank vs. National Bank, 59 *N. Y.*, 67, xvii, 305.)

A usage repugnant to the terms and objects of a written contract is not competent to vary or control it; neither can one be sustained in opposition to the established principles of law; and the law will not give sanction to one that is absurd or *unreasonable*. (Randall vs. Smith, 63 *Me.*, 105, xviii., 200, and note.)

In an action against a telegraph company for a mistake in sending a message, evidence of a usage in a local office of the company is inadmissible to vary the terms of the contract under which the message is sent. (Grinnell vs. W. U. T. Co., 113 *Mass.*, 299, xviii., 485. See Merchants and Miners Transportation Co. vs. Story, 50 *Md.*, 4, xxxiii., 293.)

Practice of few persons in business in which many are engaged does not establish a custom which all persons who are engaged in the same pursuit are presumed to know and recognize. (26 *Mo.*, 116; 69 *American Decisions*, 484.)

Parol evidence is admissible of custom *existing on a particular river*, exempting flat-boatmen from losses caused by the dangers of the river, although the bill of lading contain no such exception; but to constitute a good custom it is requisite that it should have been uniform and so *generally known* and acquiesced in and so well established that the parties must be presumed to have contracted with reference to it. (Steele vs. McTyer's Administrator, 31 *Alabama*, 660; 70 *American Decisions*, 516.)

Customs or usages, to be legal and valid, must be reasonable and consistent with good morals and sound policy. (79 *American Decisions*, 756.) Note—A custom which is unreasonable and unjust or contrary to law or *public policy*, is not binding. (Steamboat Keystone, 75 *Id.*, 123.)

Customs limited liability of common carrier cannot be shown. Where a quantity of cotton was delivered to a steamboat company for transportation, and a bill of lading given which only excepted them from "dangers of the river," and the cotton, while being transported, was forcibly taken by or round body of men, the carrier, for the purpose of relieving his liability, will not be allowed to introduce parol evidence of a custom by which all carriers navagating the river were relieved from liability for losses so occasioned without fault or negligence of the carrier.

Custom or usage, effect of which is to control rules of law, is inadmissible, as is one which tends to enlarge or restrict the explicit language of a contract. (40 *Alabama*, 184, Boon vs. Steamboat Belfast, 88 *American Decisions*, 761. See also opinion by Judge Story, in Schooner Reeside, 2 *Sum.*, 567; Steele vs. McTyler's Administrator, *supra*, overruled.)

In so much as this decision as holds that parol evidence is admissible to show that by custom existing on a particular river, flatboatmen were not responsible for a loss caused by dangers of the river, although the bill of lading contained no such exception.

Evidence of custom is inadmissible to contravene any express contract or provision of law or principle of public policy, or to give

a meaning different from their natural import to plain, unambigious words and phrases. (Barlow vs. Lambert, 65 *American Dec.*, 374. See *American Dec.*, 578.)

Generality of custom, which is unreasonable or dangerous, and productive of injury, cannot in any degree excuse an act done in conformity to it. (Hill vs. Portland, etc., R. R. Co., 55 *Maine*, 483; 92 *American Decisions*, 601.)

Usage or customs among steamboats, that they are not liable for the loss of live stock during transportation, will not relieve them from liability for loss *through negligence*, unless knowledge of such usage or custom *was brought home to the shipper*. (Pitre vs. Offutt, 21 *La. Annual*, 679; 99 *American Decisions*, 749.)

Respectfully submitted,

ALBERT H. CLARKE,
Proctor for Appellant,
77 Diamond Street, Pittsburgh, Pa.

October 27th, 1890.

FILED
JAMES H. McKEN

IN THE

Supreme Court of the United States

NO. 79, OCTOBER TERM, 1888.

DAVID HOSTETTER, Surviving Partner of the Firm of Hostetter & Smith,

against

R. C. GRAY, ALEXANDER H. MILLER, W. A. CALDWELL, JAMES P. DONNELL and J. G. HOLMES, Executors of M. W. BELTZHOOVER, Deceased.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

IN ADMIRALTY.

BRIEF OF APPELLEES.

James H. Reed

PHILANDER C. KNOX,
KNOX & REED,
PROCTORS FOR APPELLEES.

SHAW BROS PRINT

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 79 October Term, 1888.

HOSTETTER & SMITH,

against

R. C. GRAY et al.

ARGUMENT FOR APPELLEES.

Since the decision in "The Abbotsford," 98 U. S., 440, and in "The Benefactor," 102 U. S., 214, it is conclusively determined that the Act of February 16, 1875, entitled "An Act to facilitate the disposition of cases in the Supreme Court of the United States and for other purposes," confines the cognizance of this Court in admiralty appeals to the "questions of law arising on the record and to such rulings excepted to at the time as may be presented by a bill of exceptions prepared as in actions at law."

The "Francis Wright," 105 U. S., 387.
The "Annie Lindsley," 104 U. S., 187.
Ins. Co. *vs.* Allen, 121 U. S., 71.

There are five assignments of error in this case. The first and second are upon conclusions of fact found by the Circuit Court. These are eliminated from further consideration by the Act and decisions above noted.

The fourth assignment of error is based upon the failure of the Circuit Court to pass upon certain requests for findings of law and facts alleged to have been presented below. This assignment, so far as it relates to the refusal to find facts as requested, may be met by observing that no exception was taken thereto at the time or at any subsequent time, *and the matter is not presented to this Court by any bill of exceptions.* As to the failure to find the law as requested by appellant it is manifest this was not error as those conclusions were based upon the facts as proposed by him which the Court refused to adopt.

The "Annie Lindsley," 104 U. S., 188.

The third and fifth assignments of error were probably designed to raise the only question that will be considered here, namely, do the facts as found justify the decree?

As found by the Circuit Justice the facts are:

1. On December 6, 1874, the steam tow-boat "Iron Mountain," having in tow several barges (one called "Ironsides No. 3,") partly loaded with a miscellaneous cargo, left Pittsburgh bound for New Orleans. The libellants shipped by the barges 2,000 boxes of bitters and eighteen boxes of show-cards, which were placed on "Ironsides No. 3," the bill of lading stipulating that the goods were "to be delivered without delay, in like good order, at the port of New Orleans, La., the dangers of navigation, fire and unavoidable accidents excepted." A copy of the bill of lading is annexed to the original libel.

2. The tow-boat and her barges, after taking on additional cargo at various intermediate places, arrived safely at Mt. Vernon, Indiana, 819 miles below Pittsburgh, and landed to take on freight at the Mt. Vernon wharf-boat. The proprietors of the wharf-boat had engaged for the barges corn, which lay piled in sacks at two or three farm landings on the Indiana shore, the furthest pile being about two miles above the wharf-boat. The tow-boat detached from the fleet the barge "Ironsides No. 3," which was but partly loaded, and proceeded with it upstream to these piles. After loading this corn the boat crossed the river

with the barge and took on corn which was offered at two landings on the Kentucky side, viz.: New York landing, about three miles above the wharf-boat, and Whitmon's landing, which is somewhat lower down. After taking on the corn at Whitmon's the tow-boat started to return to her fleet, but while backing out in the river the barge suddenly took water and soon sunk, becoming a total wreck, the cargo, including the libellants' goods, sustaining great damage. This occurred late in the evening of December 18, 1874. A protest, signed by the officers and some of the crew, was executed December 23, 1874, assigning as the cause of the disaster that the boat struck some unseen obstruction. Immediate notice by telegram of the sinking of the barge with their goods was given the libellants.

3. That it has been the general usage in the Pittsburgh and New Orleans barge trade, coeval with the commencement of the business and constantly practiced where cargo is to be taken on en route to the port of destination at several points in the same neighborhood, to land and tie up the tow or fleet of barges at the more commodious and safer landing, and detach from the tow the barge, or barges, designated to receive such cargo, and tow the same to the several points where the cargo may be stored, whether up or down stream, or across the river.

4. That at the time of the sinking of the barge "Ironsides No. 3," it was the general and established usage for barges towed by steam vessels in the Pittsburgh and New Orleans trade, having cargo to receive at New York landing, and other points between there and Mt. Vernon, Indiana, to land and tie up the fleet at the latter place and tow back for such cargo the barge upon which it was to be placed, and that the course pursued by the "Iron Mountain" on the occasion in question was in conformity with such usage of the trade.

5. That the usage so practiced at Mt. Vernon and elsewhere, as mentioned in the foregoing findings, tends to cheapen the cost of transportation, facilitates business, and conduces to the safety of the whole tow, and is, therefore, a reasonable useage.

6. That while the steam tow-boat "Iron Mountain," with the barge "Ironsides No. 3", in tow, was backing out from Whitmon's landing, and when out in the river, the barge struck some unmarked, unknown and hidden object below the surface of the water, which caused her to take water and sink, and this, without negligence of the part of the tow-boat, or on the part of the tow-boat and barge, their agents or servants, and that it was an unavoidable accident.

The conclusion of law from the foregoing facts found is that the respondents were not liable to the libellants for the loss, damage and injury complained of in the libel, and that the libel should be dismissed.

JOSEPH P. BRADLEY,
Circuit Justice.

The exact question of law, therefore, is, did the course pursued by the vessel under the circumstances amount to a deviation in law and render her owners insurers and liable for appellants' loss?

Deviation has been defined by the Supreme Court of Massachussetts as "a voluntary departure without necessity or reasonable cause from the regular and *usual* course of the voyage."

Coffin *vs.* Newburyport Insurance Company, 9 Massachussetts, 436.

"Usage is the predominating test as to deviation."

Philips on Insurance, Sections 980-981.

"It is no deviation to touch and stay at a port out of the course of a voyage, if such departure is *within the usage of the trade.*" (*Ibid*).

"A vessel may stop at *usual* places for landing and taking in passengers and goods, and for other purposes, especially in river or coasting passages, whether under a policy of insurance or a bill of lading." Philips on Ins., Sec. 980.

Lowry *vs.* Russell, 8 Pick, 360. 3 Sand, N. Y. City Sup., Ct. R. 26.

Usage will justify deflections and delay. Phil. on Ins., 1003.

When a vessel on whose cargo insurance has been effected stops in descending a river at different places for the purpose of taking

in further cargo or passengers, such stoppages will not amount to a deviation, when proved to have been *conformable to the usages of the trade*, and of no unusual length.

Lockett *vs.* Merchants Ins. Co. of N. O., 10 Robinson (La.) Repts., 339.

The nature and object of a voyage may justify intermediate voyages and sailing forwards and backwards. Philips, 1013.

Ashley *vs.* Pratt, 16 M. & W.

By a bill of lading expressing that goods are to be carried from one port to another, a direct voyage is *prima facie* intended; but this presumption may be controlled *by a usage to stop at intermediate ports.*

Lowry *vs.* Russell, 8 Pick, 360. This case was a voyage from New York to Georgetown, D. C., the vessel went into Norfolk *thirty miles off her direct course*, held no deviation, being in conformity with the usage of that trade.

Thatcher *vs.* McCulloch, Olcott, 371. The ship Celia on a voyage from New Orleans to Northern ports went to Havana to get a full cargo—finding nothing, then she went to Key West and took on cotton. She sailed from New Orleans with pigs of lead as ballast. Part of the lead was lost. On suit for freight the consignee set up this loss.

Judge Betts: "I think independently of any binding assent to the circuitous voyage, that the evidence establishes sufficiently the usage of trade in respect to voyages from New York to New Orleans in general ships at that season when freights are short, to have been to touch at Havana to complete their cargoes. * * * * The shipper must be supposed cognizant of this course of trade, and to have had it in view when the contract was entered into, and cannot therefore take exception to it because the deviation may effect his insurance.. Nor, probably would such departure from a direct voyage be a deviation which would affect the policy." (This is in regard to going to Havana, the going to Key West was not customary).

In the case of Origin *vs.* Jennings, 1 Camp, 505, which was a case where a vessel insured from Newfoundland to Portugal went into Sidney, Nova Scotia, for a cargo of coals, Lord Eldon ruled such subordinate voyage being in conformity to usage was not a deviation.

The case of Bentaloe *vs.* Pratt, Wal. C., Ct R., 58, was an action on a policy on goods in the sloop Polly from the landing at Providence, R. I., to the unlading at Baltimore. The vessel put in at Newport and remained there eleven days. Held this was no deviation if within the usage of the trade, and that if such usage existed the underwriters were bound to know it.

In Oliver *vs.* Md. Ins. Co., 7 Cranch, 490, where the risk was described "at and from Baltimore to Barcelona, and at and from Barcelona to Baltimore," held per Marshall, C. J., no deviation to proceed from Barcelona to Salou, sixty miles for return cargo, *if within the usage of the trade.*

Bulkley *vs.* Protection Insurance Co., 2 Paine, U. S. Circuit Court Reports, 82. In this case the policy described the voyage "from Orocoke to St. Bartholomews, or St. Thomas, and at and from thence to Tobasco, and at and from thence to New York." Held that usage would justify touching at St. Bartholomews *and* St. Thomas. Further, that "where a policy describes a voyage, the usages relating to such voyages are impliedly made a part of the contract." Also, that "underwriters are presumed to know the particular usages of the trade. All matters of general notoriety and equally open to the knowledge of both parties are presumed to be known by both."

There are numerous cases ruling that intermediate voyages, sailing backward and forward, do not constitute a deviation where justified by usage, that every underwriter insuring in a particular trade is bound to know such usage, and that where intermediate ports are named in the policy, although the rule of law is that the ship must visit such ports in the geographical order of their distance from the port of departure, yet this order may be disregarded in conformity with a general custom or usage. A custom, says Sir John Davis, "taketh beginning and groweth to perfection in this manner: When a reasonable act once done is found to be good and beneficial to the people, and agreeable to their nature and disposition, then do they use it and practice it again and again, and so by often iteration and multiplication of the act, it becometh a custom."

As said by Chief Justice Thompson in McMasters *vs.* P. R. R. Co., 19 P. F. Smith, 377. "Indeed the whole system of the law of common carriers grew out of customs moulded into form and

made practical by the courts of England, and hence for a long time when suits were brought against persons engaged in the carriage of goods and merchandise, the action was called an action upon the *custom of the realm.* * * * It would be strange if the process of improvement by custom and usage is to stop just here and go no further. * * * In other words where the express words of the contract do not exclude it, usages of this kind in trade, which have a like effect when clearly established, are generally found in practice to exhibit a superior adaptedness to the convenience and wants of the community to those which are superseded by them, and in this way development and progress results."

The usages and customs of trade spring from the necessities of commerce and the law in its turn conforms to such usages. For instance, it is a rule of law that a risk on a ship, or goods therein, commences only at the very port or place named in the policy as that from which the ship is to sail, or where the goods are to be loaded, and ends only when the ship has reached the port to which it is insured. But where the liability of the carrier for the receipt and delivery of goods is called in question, if a general usage can be shown *that the ship is to sail, or the goods to be taken, or the ship land, or the goods be discharged at another place than that named in the policy the underwriter or the insurer will be bound by such usage.*

In Kingston *vs.* Knibbs, 1 Camp, 508, an action on a policy on a ship at and from Oporto to London, the ship having taken in a part of her cargo within the bar of Oporto, went outside to take in the remainder, when she was driven out to sea in a gale of wind and was captured. The defence was that the underwriters had not been informed that she was to take in any part of her cargo outside the bar. Several witnesses testified that it was customary at Oporto to go outside the bar for cargo. Held by Lord Ellenborough, that the underwriters were bound to take notice of the usage and the plaintiff must recover.

In Moscow *vs.* Atkins, 3 Camp. 200, the voyage was described in the policy, "at and from the ship loading port or ports in Amelia Island to London." There was no port in the island and ships never took cargo there. The vessel insured took her cargo at Tigre Island, several miles distance further up St. Mary's River.

Lord Ellenborough: "The real question is whether there has been a loading at Amelia Island within the meaning of the parties when the policy was effected. Strictly and locally there has been no loading at Amelia Island; *but it is possible that in mercantile contracts Amelia Island may denominate a region in which Tiqre Island is comprehended.* Essequibo has been held for some purpose to be part of Demarara, although the two settlements are quite distinct There is the more familiar instance of Westminster being considered in London, the general name for the metropolis; yet we know that in strictness London only comprehends the limits of the city. The question here will be whether upon the evidence this cargo can be said to have been loaded at Amelia Island *according to the usages of such voyages.* If it was, the policy attached, although literally speaking, no part of the cargo had ever been on Amelia Island."

Not only will the usage of trade control the language of the policy with respect to the terminus *a quo*, but also the terminus *ad quem* the vessel sails and may operate in favor of the insurer as well as the insured. As in the case of Gracie *vs.* Marine Ins. Co., 8 Cranch, 75, where it was proved that it was a custom at the Port of Leghorn to unload goods shipped to that Port at the Lazaretto, it was held that one who had insured certain goods "till they were safely loaded *at Leghorn*" could not protect them on his policy after they were landed at the Lazaretto.

So, likewise, may the description of the voyage in the policy be controlled by usage, as in the case of Pittsburgh Ins. Co. *vs.* Dravo & McDonald, 2 W. N. C., 194. Wherein the cargo of certain barges in tow of a steamboat was insured for a *direct* trip from Pittsburgh to St. Louis. On arriving at the mouth of the Ohio river, three of the barges were left there, while the steamer proceeded with the remaining barges to St. Louis, intending to return for the barges left, which were lost before her return. This practice was termed double tripping, as there being evidence that the practice was a common one, the plaintiff recovered for the loss of the cargo, holding that the naming or describing a trip of voyages comprehends the usages incidental to it.

Salvador *vs.* Hopkins, 3d Burr., 1707. It is said by Lord Mansfield that insurance companies are bound to take notice of

the usages and customs of the East India Company, and in Gregory *vs.* Christy "to understand a policy we must refer to the course of trade to which the policy relates."

Vallance *vs.* Dewar, 1 Campbell, 503. This was an action upon a policy of insurance on the ship Courier, and her freight and cargo at and from any port or ports in Newfoundland to one port of discharge in Portugal, or to any port or ports of the United Kingdom. The Courier arrived in Newfoundland in June, and was employed till the 13th of October in banking or fishing on the banks of that coast. She then began to take in a cargo and sailed for England on December 22d, and was lost. The defence was that the underwriters had not been informed that the ship was to be employed in banking while at Newfoundland, and that by the banking their risk was increased, for by the delay occasioned by the banking, their voyage home was turned from a summer to a winter voyage. The plaintiff said that according to established usage of the Newfoundland trade, ships after their arrival were employed in banking or making intermediate voyages. Of this as of every other usage of trade, the underwriters were bound to take notice. Lord Ellenborough said: "Things are presumed to go on in their ordinary course, and if an usage be general, though not uniform, the underwriters are bound to take note of it."

From the above authorities we assume it is clear that the course of the vessel having been in conformity with a general usage of the trade; "a usage coeval with the commencement of the business and constantly practiced;" a usage "which tends to cheapen the cost of transportation, facilitates business, conduces to the safety of the whole tow, and therefore a *reasonable* usage;" that it did not constitute a deviation and the decree below is right.

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